

(21,049.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 89.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER AND LUX.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Order extending time to docket case	1	1
Transcript from the circuit court of the United States for the district of Nevada	2	1
Bill of complaint of Miller & Lux	2	1
Order to show cause why injunction <i>pendente lite</i> should not issue.	20	9
Subpcena	22	10
Marshal's return	24	11
Supplemental bill of Pacific Livestock Co.	25	12
Affidavit of Thomas B. Rickey	47	21
Charles Rickey	58	26
Alice B. Rickey	61	27
Order for injunction <i>pendente lite</i>	64	28
Petition for appeal	67	30
Assignment of errors	70	31
Order for appeal	76	34
Bond on appeal	77	35
Clerk's certificate to transcript	80	36
Citation to Miller & Lux	81	36
Citation to Pacific Livestock Co.	83	37

	Original.	Print.
Certificate of clerk of U. S. circuit court of appeals to printed transcript of record	85	38
Caption to proceedings in U. S. circuit court of appeals.	86	39
Order of submission.	87	39
Opinion	88	39
Decree	116	52
Order denying petition for rehearing.	118	52
Clerk's certificate to proceedings in U. S. circuit court of appeals. .	118	53
Writ of certiorari.	120	53
Stipulation as to return to writ of certiorari.	123	54
Return to writ of certiorari.	126	55

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the District of Nevada.

1 In the United States Circuit Court of Appeals, Ninth Circuit.

MILLER & LUX (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order Extending Time to Docket Cause.

Good cause therefore appearing, it is hereby ordered that the time wherein defendant and appellant in the above-entitled action may file the record thereof and docket the case with the clerk of this Court at San Francisco, California, may be enlarged and extended, so as to extend to and include the 23d day of September, 1906, and it is so ordered.

Dated this 22d day of August, 1906.

WM. M. MORROW,
Circuit Judge.

[Endorsed:] No. 1366. In the United States Circuit Court of Appeals, Ninth Circuit, District of California. Miller & Lux, a corporation, Complainant, vs. Rickey Land and Cattle Company, a corporation, Defendant. Order extending time. Filed Aug. 24, 1906. F. D. Monckton, Clerk. Refiled Aug. 29, 1906. F. D. Monckton, Clerk.

2 In the Circuit Court of United States for the District of Nevada. In Equity.

MILLER & LUX (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Nevada:

Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business

at San Francisco, California, and a citizen of the State of California, brings this its bill against the Rickey Land and Cattle Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the County of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada: and thereupon your orator complains and says:

1. That your orator is a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a
3 citizen of the State of California; and it has been such corporation, and has had its principal place of business at the place aforesaid, continuously since the 5th day of May, 1897.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the said State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

3. That on the 10th day of June, 1902, your orator exhibited to and and filed in this Court its bill of complaint against one Thomas B. Rickey, and against many other persons; which suit is numbered 731 on the equity docket of this Court.

4. That thereafter, on the said 10th day of June, 1902, this Court duly issued its writ of subpoena in said suit upon said bill of complaint, directed to the said Thomas B. Rickey and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpoena was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon the other defendants in said suit.

5. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this Court his plea to
4 the jurisdiction of said Court, which plea was overruled by this Court, and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint, and he has answered the same.

6. That the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this Court as to all of the defendants thereto.

7. That in and by the said bill of complaint your orator (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seized in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said District of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed, and stream of said river; and further alleged that, at divers times therein set forth, your orator, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all to a flow of nine hun-

dred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same
5 from said river to and upon certain lands and used the same for the irrigation thereof, and that your orator was then the owner by such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that, within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey, had, and that each of them had, diverted the waters of said Walker River at divers places on said river above the said lands of your orator, and above the points at which your orator so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving your orator of a large portion of said water to which your orator is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same under claim of right so to do, and adversely to your orator; and further allege that, by the diversions aforesaid, your orator has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable, and so long as said diversions are continued will be unable to irrigate its said lands which it
6 had theretofore been accustomed to irrigate, and is thereby rendered unable and will be unable to properly or successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit or either of them has any right to divert any water from the said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by your orator, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of your orator so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars (\$2,000).

8. That, in and by the said bill of complaint, your orator, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where your orator so diverts the same, in such manner or to such extent as to deprive your orator of any of the water aforesaid, and also for general relief.

9. That thereafter, to wit, on the 6th day of August, 1902, and after the filing of the said bill of complaint, and after the service upon the said Thomas B. Rickey of the writ of subpoena in said suit, and
7 after the said Thomas B. Rickey had appeared therein, the said Thomas B. Rickey caused the defendant, the Rickey Land and Cattle Company, to be organized and incorporated, and it was, on that day, organized and incorporated under the laws of the State of Nevada.

10. Upon and according to its information and belief, your orator avers that the only person really interested in said corporation de-

fendant, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey, and hold their said stock solely for him and for his benefit.

11. That, as your orator is informed and believes, the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do.

12. That after the said incorporation and organization of the said Rickey Land and Cattle Company, the defendant herein, the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to divert
8 any water from the said Walker River; and the said defendant corporation has ever since claimed to be the owner of said lands and water rights.

13. That thereafter, to wit, on the 15th day of October, 1904, the said defendant, the Rickey Land and Cattle Company, commenced an action in the Superior Court of the County of Mono, State of California, against your orator and against a large number of other persons, which action is numbered 1055 on the register of said Superior Court.

14. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and had been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff
9 therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the

State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orator, claim some right, title, and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West fork of the Walker River, that said right, title and interest so claimed by said defendants and each of them, including your orator, in and to said water is without right,

and that all claims of them and each of them to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein, (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second.

15. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use and enjoyment, of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said court further adjudge that neither of the defendants therein, including your orator, has any right, title, interest, claim, or estate in or to any of the waters flowing or which may hereafter flow in the said West Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orator, are

11 estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and also for general relief.

16. That, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon your orator.

17. That, on the said 15th day of October, 1904, the defendant herein, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against your orator and against a large number of other persons, which action is numbered 1056 on the register of said court.

18. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said

defendant (plaintiff therein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of the rest of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orator, claim some right, title and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River; that said right, title and interest so claimed by said defendants and each of them, including your orator, in and to said water is without right, and that all claims of them and each of them to the waters of said East Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second.

19. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use, and enjoyment, of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and that said court further adjudge that neither of the defendants therein, including your orator, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River in the State of California, when the quantity of water therein

flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orator, are estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors, or assigns, any right, title claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second; and also for general relief.

20. That, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon your orator.

15 21. That by the laws of the State of California an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the Court in which such complaint is filed.

22. That the issues tendered by said complainants in said two actions so brought by the defendant herein as plaintiff against your orator and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this Court, so far as the same related to the defendant, Thomas B. Rickey, in said suit.

23. That, at the time of the filing by the defendant herein of its complaint aforesaid, the said defendant did not have or claim to have, and does not now have or claim to have, any right whatever in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey.

24. That the defendant herein, in and by the actions aforesaid, intended, and the necessary effect of said actions is, to bring on for trial and determination in said Superior Court the same issues presented by the said bill of complaint of your orator in the

16 said suit so brought by it in this Court, so far as relates to the issues between your orator and the said Thomas B. Rickey, and to obtain from said Superior Court a judgment determining said issues in advance of a determination of the same by this Court, and thereby to defeat the jurisdiction of this Court in the said suit so now pending before it, and to hinder and embarrass this Court in the trial of said issues, and in the enforcement of any decree which this Court may render in the said suit so pending before it; and further prosecution of said actions, or either of them, as against your orator would therefore be in derogation of the jurisdiction of this Court and of the rights of your orator in the suit so brought by it in this Court and now pending therein.

25. That the matter in dispute herein, to wit, the right of your orator to maintain its suit aforesaid without hindrance from or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand (\$2,000).

And your orator alleges that all of the said acts, doings, and claims of the said defendant herein are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in

17 a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orator may have that relief which it can attain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, and that the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from further prosecuting, as against your orator, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against your orator, and that your orator may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpoena, to be directed to said defendant, the Rickey Land and Cattle Company, a corporation, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

18 And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from further prosecuting, as against your orator, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against your orator.

And may it further please your Honors to make and issue an order requiring the said defendant, the Rickey Land and Cattle Company, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction, pendente lite, as above prayed for, should not be issued, and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of

19 them, until the hearing of such order to show cause, and until the further order of this Court, from doing all or any of the acts aforesaid.

[SEAL.]

MILLER & LUX, *Complainant*,
By J. LEROY NICKEL,
Vice-President,
DAVID BROWN, *Secretary*.

W. C. VAN FLEET,
W. B. TREADWELL,

Solicitors for Complainant.

ISAAC FROHMAN,
Of Counsel for Complainant.

STATE OF CALIFORNIA.

City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn, upon his oath deposes and says: That he is the vice-president of Miller & Lux, a corporation, the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

20 Subscribed and sworn to before me this 3d day of January, 1905.

[NOTARIAL SEAL.]

GEO. T. KNOX,
*Notary Public, in and for the City and County
of San Francisco, State of California.*

[Endorsed:] No. 791. In Equity. In the Circuit Court of the United States for the District of Nevada. Miller & Lux, Complainants, v. Rickey Land & Cattle Company, Defendant. Bill of Complaint. Filed January 4th, 1905. T. J. Edwards, Clerk. W. C. Van Fleet and W. B. Treadwell, Mills Building, San Francisco, Cal., Solicitors for Complainant.

In the Circuit Court of the United States, for the District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,

vs.

THE RICKEY LAND AND CATTLE COMPANY, (a Corporation),
Defendant.

Order to Show Cause Why Injunction Pendente Lite Should Not Issue.

21 Good cause appearing therefor, by the verified bill of complaint of Miller & Lux, a corporation, complainant, on file herein, it is ordered that the said defendant, the Rickey

Land and Cattle Company, a corporation, show cause before this Court on the 13th day of March, 1905, at the hour of ten o'clock A. M., at the courtroom of this Court at Carson City, Nevada, why an injunction should not issue pending this suit, according to the prayer of said bill.

And it further appearing to the Court that there is danger of irreparable injury from delay, it is therefore further ordered that, until the hearing and determination of said motion for injunction, and until the further order of this Court, the said defendant, the Rickey Land and Cattle Company a corporation, its agents, servants and attorneys, and all persons acting in aid of them or either of them, be and they are hereby enjoined and restrained from further prosecuting, as against said complainant, either of the two certain actions brought on the 15th day of October, 1904, by the said Rickey Land and Cattle Company, as plaintiff, against the said Miller & Lux, a corporation, and others, as defendants, in the Superior Court of the County of Mono, State of California, and respectively numbered on the register of said Superior Court 1055 and 1056.

And it is further ordered that, before said restraining order takes effect, the said complainant file in this Court a bond, approved by a judge of this Court, in the sum of ten thousand dollars (\$10,000), conditioned according to law.

And it is further ordered that a copy of this order be served upon the said corporation defendant, and on one of its attorneys (namely, on either Mr. James F. Peck or Mr. Charles C. Boynton, or Mr. William O. Parker), on or before the 30th day of January, 1905.

THOMAS P. HAWLEY, Judge.

[Endorsed:] No. 791. Circuit Court of the United States for the District of Nevada. Miller & Lux, Complainant, vs. Rickey Land & Cattle Company, Defendant. Order to Show Cause why Injunction Pendente Lite should not Issue. Filed January 4th, 1905. T. J. Edwards, Clerk.

Subpoena ad Respondendum.

DISTRICT OF NEVADA, ss:

The President of the United States of America, to The Rickey Land and Cattle Company, a Corporation, Greeting:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States for the District of Nevada, in the Ninth Judicial Circuit, on the 6th day of February, 1905, to answer unto a bill of complaint exhibited against you in said court by Miller & Lux, a corporation; and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court hereunto affixed,

at Carson City, Nevada, on the 4th day of January, 1905, and of the year of the Independence of the United States the 129th.

Attest:

T. J. EDWARDS, *Clerk*.

W. C. VAN FLEET,

W. B. TREADWELL,

Solicitors for Complainant.

ISAAC FROHMAN,

Of Counsel for Complainant.

MEMORANDUM: The defendant is to enter its appearance in the above-mentioned suit, in the clerk's office at Carson City, Nevada (Federal Building), on or before the day at which the above subpoena is returnable, otherwise the bill may be taken pro confesso.

T. J. EDWARDS, *Clerk*.

24 United States Circuit Court, District of Nevada.

791.

MILLER & LUX (a Corp'n)

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corp'n).

Return.

I certify and return that I received the within and hereto annexed subpoena to appear and answer complainant's bill, on the 4th day of January, 1905, together with a certified copy of order to show cause; also certified copy of complaint, in the above-entitled case, and personally executed same on Thos. B. Rickey at Carson City, Nevada, on the 5th day of January, 1905, by exhibiting to the said Thos. B. Rickey the original of said subpoena, and leaving in his possession a copy thereof, together with said certified copy of order to show cause and also said certified copy of complaint.

Dated Carson City, Nevada, January 5, 1905.

ROBERT GRIMMON,

U. S. Marshal.

Fees—2 services, \$8.00.

[Endorsed:] No 791. U. S. Circuit Court, District of Nevada. Miller & Lux, a corporation, vs. The Rickey Land and Cattle Company, a corporation. Subpoena to Appear and Answer Complainant's Bill. Filed on return, January 5th, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

In Equity. No. 791.

MILLER & LUX (a Corporation), Complainant.

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant.

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), and
MILLER & LUX (a Corporation), Defendants.

Supplemental Bill of Pacific Livestock Company.

To the Judges of the Circuit Court of the United States for the District of Nevada:

26 The Pacific Livestock Company, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, brings this its bill against the Rickey Land and Cattle Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the County of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada, and against Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, and thereupon your orator complains and says:

1. That your orator is, and ever since the 23d day of January, 1888, has been, a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a citizen of the State of California.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

27 3. That the defendant Miller & Lux is, and ever since the 5th day of May, 1897, has been, a corporation organized and existing under the laws of the State of California, and has its principal place of business at San Francisco, in the State of California, and is a citizen of the State of California.

4. That, on the 10th day of June, 1902, the said Miller & Lux, as complainant, exhibited to and filed in this court its bill of complaint against one Thomas B. Rickey and against many other persons; which suit is numbered 731 on the equity docket of this court.

5. That thereafter, on the said 10th day of June, 1902, this court duly issued its writ of subpoena in said suit upon said bill of complaint, directed to the said Thomas B. Rickey and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpoena was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon the other defendants in said suit.

6. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this court his plea to the jurisdiction of said court, which plea was overruled by this Court, and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint; and he has answered the same.

28 7. That the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this court as to all of defendants thereto.

8. That in and by the said bill of complaint, the said Miller & Lux (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seised in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said District of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed and stream of said river; and further alleged that, at divers times therein set forth, the said Miller & Lux, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all to a flow of nine hundred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same from said river to and upon certain lands and used the same for the irrigation thereof, and that the said Miller & Lux was then the owner by such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that,

29 within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey, had, and that each of them had, diverted the waters of said Walker River at divers places on said river above the said lands of the said Miller & Lux, and above the points at which the said Miller & Lux so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving the said Miller & Lux of a large portion of said water to which the said Miller & Lux is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same, under claim of right so to do, and adversely to the said Miller & Lux; and further alleged that, by the diversions aforesaid, the said Miller &

Lux has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable, and so long as said diversions are continued will be unable, to irrigate its said lands which it had theretofore been accustomed to irrigate, and is thereby rendered unable and will be unable to properly or
30 successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit, or either of them, has any right to divert any water from the said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by the said Miller & Lux, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of the said Miller & Lux so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars (\$2,000).

9. That, in and by the said bill of complaint, the said Miller & Lux, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said Miller & Lux so diverts the same, in such manner or to such extent as to deprive the said Miller & Lux of any of the water aforesaid, and also for general relief.

10. That thereafter, to wit, on the 4th day of January, 1905, the said Miller & Lux, as complainant, exhibited to and filed in this court its bill of complaint in this suit against the said defendant the Rickey Land and Cattle Company; and thereafter, on the said

4th day of January, 1905, this court duly issued its writ of
31 subpoena in this suit upon said bill of complaint directed to the said Rickey Land and Cattle Company, and thereafter the said writ of subpoena was duly served by the marshal of this district upon the said Rickey Land and Cattle Company, and the said Rickey Land and Cattle Company thereafter appeared in this suit; and this suit is now pending and undetermined in this court.

11. That, in and by its bill of complaint in this suit, the said Miller & Lux alleged, among other things, the matters and things aforesaid; and further alleged that, on the 6th day of August, 1902, and after the filing of the said bill of complaint number 731, and after the service upon the said Thomas B. Rickey of the writ of subpoena in said suit, and after the said Thomas B. Rickey had appeared therein, the said Thomas B. Rickey caused the said Rickey Land and Cattle Company to be organized and incorporated, and it was, on that day, organized and incorporated under the laws of the State of Nevada; and further alleged that the only person really interested in said corporation Rickey Land and Cattle Company, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey,

and hold their said stock solely for him and for his benefit;
32 and further alleged that the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain

lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do; and further alleged that after the said incorporation and organization of the said Rickey Land and Cattle Company the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to divert any water from the said Walker River; and the said Rickey Land and Cattle Company has ever since claimed to be the owner of said lands and water rights; and further alleged that thereafter, to wit, on the 15th day of October, 1904, the said Rickey Land and Cattle Company commenced an action in the Superior Court of the County of Mono, State of California, against the said Miller & Lux and against a large number of other persons, which action is numbered 1055 on the register of said Superior Court; and further alleged that said action was commenced by said Rickey Land and Cattle Company, as plaintiff therein, by the filing of a complaint, in and by which the said Rickey Land and Cattle Company (plaintiff therein) alleged,

33 among other things, that it is, and had been since the 6th day of August, 1902, the owner in possession, and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey, and that the said lands constituted one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon, and that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of the said, West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, and that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River, and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of

34 said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada, and that the defendants in said action, and each of them, including the said Miller & Lux, claim some right, title and interest adverse to the said Rickey Land and Cattle Company (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River; that said right, title and interest so claimed by said defendants, and each of them, including the said Miller & Lux, in and to said water is without right, and that all claims of them, and

each of them, to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that, in and by said complaint, the said Rickey Land and Cattle Company (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the said Rickey Land and Cattle Company

- 35 (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said Court further adjudge that neither of the defendants therein, including the said Miller & Lux, has any right, title, interest, claim, or estate in or to any of the waters flowing, or which may hereafter flow, in the said West Fork of the said Walker River, in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants, and each of them, including the said Miller & Lux, are estopped to claim or assert against the said Rickey Land and Cattle Company (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and also for general relief; and further alleged that, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon.
- 36 which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and that thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon the said Miller & Lux; and further alleged that on the said 15th day of October, 1904, the said Rickey Land and Cattle Company, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against the said Miller & Lux and against a large number of other persons, which action is numbered 1056 on the register of said court; and further allege that said action was commenced by the said Rickey Land and Cattle Company, as plaintiff therein, by the filing of a complaint, in and by which the said Rickey Land and Cattle Company (plaintiff herein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner, in possession and entitled to the possession of the rest of the lands aforesaid so conveyed to it by the said Thomas B. Rickey, and that the said lands constituted one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker

River, called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East Fork of said river,

37 and situated along and bordering thereupon, and that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second, and that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River, and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada, and that the defendants in said action, and each of them, including the said Miller & Lux, claim some right, title and interest, adverse to said Rickey Land and Cattle Company (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River, that said right, title and interest, so claimed by said defendants and each of them, including the said Miller &

38 Lux, in and to said water is without right, and that all claims of them and each of them to the waters of said East Fork of said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that, in and by said complaint, the said Rickey Land and Cattle Company (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the said Rickey Land and Cattle Company (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second, and that said Court further adjudge that neither of the defendants therein, including the said Miller & Lux, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River, in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the

39 said defendants and each of them, including the said Miller & Lux, are estopped to claim or assert against the said Rickey Land and Cattle Company (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, interest or estate in or to

any of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and also for general relief; and further alleged that, upon the filing of said complaint in said Superior Court, there was issued out of said court its writ of summons thereupon, which is the appropriate process under the laws of the State of California, for obtaining jurisdiction over the persons of the defendants in an action, and that thereafter, to wit, on the 22d day of October, 1904, the said writ of summons was served upon the said Miller & Lux; and further alleged by the laws of the State of California, an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the court in which such complaint is filed; and further alleged that the issues tendered by said complaints in said two actions so brought by the

40 said Rickey Land and Cattle Company, as plaintiff, against the said Miller & Lux, and said other persons, are, so far as concerns the said Miller & Lux, the same issues which were tendered by the said bill of complaint of the said Miller & Lux, number 731, so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suit; and further alleged that, at the time of the filing by the said Rickey Land and Cattle Company of its complaints aforesaid, the said Rickey Land and Cattle Company did not have or claim to have, and does not now have, or claim to have, any right whatever in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey; and further alleged that the said Rickey Land and Cattle Company, in and by the actions aforesaid, intended, and the necessary effect of said actions is, to bring on for trial and determination in said Superior Court the same issues presented by the said bill of complaint of the said Miller & Lux in the said suit, number 731, so brought by it in this court, so far as relates to the issues between the said Miller & Lux and the said Thomas B. Rickey, and to obtain from said Superior Court a judgment determining said issues in advance of a determination of the same by this court, and thereby to defeat the jurisdiction of this court in the said suit now pending before it, and to hinder and embarrass this court in

41 the trial of said issues, and in the enforcement of any decree which this court may render in the said suit, number 731, so pending before it, and that further prosecution, of said actions, or either of them, as against the said Miller & Lux, would therefore be in derogation of the jurisdiction of this court and of the rights of the said Miller & Lux in the suit, number 731, so brought by it in this court, and now pending therein; and further alleged that the matter in dispute in this suit, to wit, the right of said Miller & Lux, to maintain its said suit, number 731, without hindrance from, or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand dollars (\$2,000).

12. That, in and by its said bill of complaint in this suit, the said

Miller & Lux, complainant therein, prayed, among other things, that the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, should be enjoined and restrained from prosecuting, as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against the said Miller & Lux, and also for general relief; and further
42 prayed that, during the pendency of this suit, this court should grant its writ of injunction pendente lite to restrain any and all of the acts aforesaid, and to make and issue an order requiring the said Rickey Land and Cattle Company to show cause why such writ of injunction pendente lite should not be issued, and to issue a temporary restraining order restraining all or any of the acts aforesaid during the hearing of such order to show cause, and until the further order of this Court.

13. That, on said 12th day of June, 1905, the said Miller & Lux, by its good and sufficient deed of grant, bargain, and sale, granted and conveyed to your orator, the said Pacific Livestock Company, all of the lands aforesaid, and all its water rights and appropriations aforesaid, and all its ditches, flumes, and waterways used in connection with the same, and all its cause and causes of suit complained of in said bill number 731, and all its right to the relief prayed for in said bill number 731, and your orator has ever since been and now is the owner of all of said property and rights.

14. That the matter in dispute in this suit, to wit, the aforesaid rights of said Miller & Lux and of your orator so infringed by the aforesaid acts of the said Rickey Land and Cattle Company, exceeds, exclusive of interest and costs, the value of two thousand dollars (\$2,000); and the matter in dispute in this supplemental bill, to
43 wit, the right of your orator to have the benefit of all the pleadings and proceedings in this suit heretofore had and taken, exceeds, exclusive of interest and costs, the value of two thousand dollars (\$2,000).

And your orator alleges that all of the said acts, doings, and claims of the said Rickey Land and Cattle Company are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator and the said Miller & Lux in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orator may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, and that the said defendant the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from prosecuting, as against your orator or as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking

any steps whatsoever in either of said actions as against your orator or as against the said Miller & Lux, and that your orator may
 44 be admitted as a party complainant in the above-entitled suit, together with the said Miller & Lux, and that your orator may also have for itself the relief against the said Rickey Land and Cattle Company prayed for in this suit, and that your orator may have all benefit and advantage of all the pleadings and proceedings in this suit, in the same manner and to the same extent as if your orator had originally been one of the complainants therein, and that this bill may be taken as supplemental to the original bill in this suit, and that your orator may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpoena, to be directed to said defendants, the Rickey Land and Cattle Company, a corporation, and Miller & Lux, a corporation, commanding them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, directions, and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pend-
 45 ency of this suit, to issue your writ of injunction, enjoining and restraining the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from prosecuting, as against your orator or as against the said Miller & Lux, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any step whatsoever in either of said actions as against your orator or as against the said Miller & Lux.

And may it further please your Honors to make and issue an order requiring the said Rickey Land and Cattle Company to show cause before this Honorable Court, at a time and place therein fixed, why said writ of injunction, pendente lite, as above prayed for, should
 not be issued; and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them or either of them,
 46 until the hearing of such order to show cause, and until the further order of this Court, from doing all or any of the said aforesaid.

PACIFIC LIVESTOCK COMPANY,

Complainant,

By J. LEROY NICKEL, *Vice-President,*

[CORPORATE SEAL.]

C. Z. MERRITT, *Secretary,*

W. C. VAN FLEET,

W. B. TREADWELL,

Solicitors for Complainant.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn, deposes and says: That he is the vice-president of the Pacific Livestock Company, corporation complainant above named; that he has read the foregoing supplemental bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 3d day of August, 1905.

[NOTARIAL SEAL.]

GEO. T. KNOX,

*Notary Public in and for City,
County, and State Aforesaid.*

47 [Endorsed:] No. 791. In Equity. In the Circuit Court of the United States, for the District of Nevada. Miller & Lux, a Corporation, Complainant, v. Rickey Land & Cattle Company, a Corporation, Defendant. Supplemental Bill of Pacific Livestock Company. Filed by leave of court, August 7th, 1905, T. J. Edwards, Clerk. W. C. Van Fleet and W. B. Treadwell, Mills Bldg., San Francisco, Cal., Solicitors for Pacific Livestock Company.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

Affidavit of Thomas B. Rickey.

STATE OF NEVADA,

County of Ormsby, ss:

Thomas B. Rickey, being duly sworn, deposes and says: That he is one of the defendants in the bill of complaint in the action commenced herein, No. 731, wherein Miller & Lux, a corporation, is complainant, and Thomas B. Rickey and others are defend-
48 ants; and that he is and since its organization has been the President of the Rickey Land & Cattle Company, a corporation, defendant herein; that he is not now, nor has he at any time since the organization of said corporation, been the manager of said corporation; that the manager of said corporation is, and at all times since the organization has been, one Charles Rickey, and that the active management of the said corporation and its affairs has been conducted by the said Charles Rickey.

It is provided by the laws of the State of California in Section 738 of the Code of Civil Procedure of said State, as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided,

49 however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

That under the laws of the State of California, a person or corporation may commence and prosecute an action to final judgment in the Superior Court of said State, to quiet and determine his or its title to real estate and water, and the use of water, flowing in the streams in said state, against any person or corporation claiming an adverse interest or title to such real estate, or to such water, or to such use of water.

That the Rickey Land and Cattle Company, a corporation, was organized on the 24th day of July, 1902, by Thomas B. Rickey, the affiant, Charles W. Rickey and Alice B. Rickey, who were the incorporators and subscribers to the capital stock of said corporation; and the said corporation was not organized on the 6th day of August, 1902, by the affiant, and was at no time organized by the affiant, except in so far as he participated with those associated with him in the organization of said corporation. That the purposes for which said Rickey Land and Cattle Company was organized were, "To buy and sell and own and to reclaim farm and graze lands; to locate and buy and sell water and water rights; and to use the same for irrigation and mechanical purposes; to build and construct

50 dams and reservoirs and to store water therein for the purposes of irrigation and distribution and sale; to buy and sell and raise all kinds of livestock, hay and grain and to do all kinds of farming business and to engage in all kinds of agricultural and dairy pursuits and business, and to engage in and to do a general merchandizing business, all in the States of California, Nevada, and elsewhere." That pursuant to the purposes expressed in said articles of incorporation the said corporation acquired by conveyance certain lands and certain water rights of said Thomas B. Rickey, the affiant, on the 6th day of August, 1902, part of which said lands are described in the complaints in said suits commenced in said Mono County, referred to in the complaint herein.

That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his rights, title and interest to certain water rights, and rights to the use of water; and said water rights, and rights to the use of water are in part the water rights,

and rights to the use of water described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said

51 lands by Thomas B. Rickey, and said water rights, and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusive and peaceably.

That under the laws of the State of California, the adverse possession and use of water for a period of five years by the person or corporation claiming the right to said water, and its grantors and predecessors in interest, confers a title and right to the continued use of said water.

By the laws of the State of California it is provided:

"Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will, or succession.

52 Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

That Charles Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company; and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all times since the organization of said corporation, have been, in the absolute control of said stock, free from any right by interference, management or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so

53 owned and held by them for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal

or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars.

That the Rickey Land and Cattle Company, a corporation, mentioned in the complaint herein, is not a defendant in the original complaint filed in that certain action, No. 731, referred to in the complaint herein, wherein Miller & Lux is complainant, and affiant and others, are defendants; nor has the said corporation been made a party by any order of this Court.

Affiant denies and says that it is not true that the only person really or at all interested in said corporation, the Rickey Land and Cattle Company, or really, or otherwise, owning any of the stock thereof, is the said affiant, Thomas B. Rickey. And denies and says it is not true that the persons, other than Thomas B. Rickey, affiant, forming the said corporation, the Rickey Land and Cattle Company, or holding the stock thereof, are only nominees of the said Thomas B. Rickey, or that they hold their said stock solely, or at all, for him, or for his benefit.

54 That in the complaints in the actions commenced in Mono County, State of California, as alleged in the complaint herein, it is not alleged that the lands described in said complaints, or any of them were conveyed to the plaintiff in said actions by the said Thomas B. Rickey, nor is any reference therein had to any conveyance or transfer by said Thomas B. Rickey, to the said plaintiff in said action.

Affiant denies and says that it is not true that the issues, or any issue, tendered by said complaints in said two actions, or either of them, brought by the defendant, the Rickey Land and Cattle Company herein, as plaintiff in said actions, against the complainant herein, are, so far as concerns complainant herein, the same issues, or any issue, which were tendered by the bill mentioned in the complaint herein so filed in this court.

Affiant denies that at the time of filing by the defendant, the Rickey Land and Cattle Company, herein, of its complaints in the Superior Court of said County of Mono, State of California, or at any other time, the said defendant, the Rickey Land and Cattle Company, did not have or claim to have, or does not now have or claim to have, any right in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such right or rights, if any, as was acquired by said Rickey Land and

55 Cattle Company by said conveyance alleged in the complaint herein to have been made to it from the said Thomas B. Rickey, affiant.

Denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in and by the actions, or either of them, commenced in the said Superior Court of the County of Mono, State of California, intended, or that the necessary, or any, effect of said actions, or either of them, is to bring on for trial or determination in said Superior Court, the same issues, or any issue, presented by said bill of complaint filed by the complainant herein

in the said action, No. 731, wherein Miller & Lux is complainant and the said affiant and others are defendants.

And denies and says it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions commenced in said Superior Court of Mono County, is to obtain from said Superior Court a judgment determining the issues, or any of them, presented by the said bill of complaint in said action No. 731, in advance of a determination of the same by this Court, or to do anything else therein, or to cause any other action to be taken by said Court for the purpose of defeating, or which will defeat, the jurisdiction of this Court in the said suit alleged in complainant's complaint.

56 And the said affiant denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions, or either of them, so commenced in the Superior Court of Mono County, is to hinder or embarrass, or will hinder or embarrass, or that any action of said defendant in said Superior Court of Mono County, or any action of said Superior Court of Mono County in said actions, or either of them, will hinder or embarrass this Court in the trial of the issues, or any of them, in said suit, or in the enforcement of any decree which this Court may render in the said suit so pending before it.

And denies and says that it is not true that the further prosecution of said actions, or either of them, as against the complainant herein would be in derogation of the jurisdiction of this Court, or of the rights, or any right, of the complainant in the suit alleged in the complaint herein.

And in this behalf affiant alleges that the said actions so commenced in Mono County, and each of them, are brought in good faith, regardless of any effect they may have upon the said suit of Miller & Lux vs. T. B. Rickey and others, No. 731, in this cause, for the purpose of having and procuring a judgment quieting the title of said Rickey Land and Cattle Company to the said waters, water rights, and the use of the waters described in said

57 complaints in said actions commenced in Mono County, State of California, and are so brought at this time because the said Rickey Land and Cattle Company, and its officers, deem such action prudent and necessary, because of the old age and infirmity of many of the witnesses whose testimony is necessary to establish the rights of said Rickey Land and Cattle Company to the said waters, and rights to the waters, and rights to the use of waters described in said complaints in said actions commenced in Mono County, State of California, as against the defendants in said suits, and because the relief sought in said actions so commenced in the Superior Court of Mono County, cannot be obtained in any other court.

Affiant further denies and says that it is not true that all, either, or any of the said acts, doings, or claims of the said defendant, Rickey Land and Cattle Company, herein, are contrary to equity

or good conscience, or that they, or either of them, tend to the manifest or any, wrong, injury, or oppression of the complainants, or either of them, in the premises.

Wherefore, the affiant, on behalf of said Rickey Land and Cattle Company, prays that this Court deny the petition herein.

THOMAS B. RICKEY.

58 Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[SEAL.]

CHAS. H. PETERS,

Notary Public in and for Ormsby Co., Nevada.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

MILLER & LUX, Complainant,

vs.

RICKEY LAND AND CATTLE COMPANY, Defendant.

Affidavit of Charles Rickey.

STATE OF CALIFORNIA,

County of Inyo, ss:

Charles Rickey, being duly sworn, deposes and says: That he is, and at all the times mentioned herein was, a citizen of the State of California, over the age of twenty-one years and a resident of Topaz, County of Mono, State of California.

That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100)

59 shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (20,000.00) dollars.

That affiant became the owner of said shares by subscription to the capital stock of said corporation.

That Thomas B. Rickey, does not own, nor has he at any time owned, any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addi-

tion thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River, and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

CHARLES W. RICKEY.

Subscribed and sworn to before me, this 10th day of March, 1905.

[SEAL.]

P. W. FORBES,

*Notary Public in and for the County
of Inyo, State of California.*

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

MILLER & LUX, Complainant,

vs.

RICKEY LAND AND CATTLE COMPANY, Defendant.

61 *Affidavit of Alice B. Rickey.*

STATE OF NEVADA,

County of Ormsby, ss:

Alice B. Rickey, being duly sworn, deposes and says: That she is, and at all the times mentioned herein was, a citizen of the State of Nevada, over the age of twenty-one years, and a resident of Carson City, County of Ormsby, State of Nevada.

That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation, owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (\$20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

That Thomas B. Rickey does not own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River, and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit: 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive continuous and adverse to the said plaintiffs herein and to all the world.

ALICE B. RICKEY.

63 Subscribed and sworn to before me this 13th day of Mar., 1905.

[SEAL.]

CHAS. H. PETERS,

Notary Public in and for Ormsby County, Nevada.

[Endorsed:] No. 791. In the Circuit Court of the U. S., Ninth Circuit, District of Nevada. Miller & Lux, a corporation, Complainant, vs. Rickey Land & Cattle Company, a corporation, Defendant. Affidavit of Thomas B. Rickey, Charles Rickey and Alice B. Rickey, to the Order to Show Cause why Injunction should not issue restraining action in Mono County. Filed, March 13th, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

64 THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), and
MILLER & LUX (a Corporation), Defendants.

Order for Injunction Pendente Lite.

The order heretofore made herein on motion of the original complainant Miller & Lux, a corporation, requiring the defendant, the Rickey Land and Cattle Company, a corporation, to show cause

why an injunction should not issue pending this suit, according to the prayer of the bill of complaint of said Miller & Lux, having come on regularly to be heard upon the verified complaint herein, and upon affidavits filed by the defendant in opposition to said motion, and the Court having heard the arguments of counsel for said complainant and defendant, and the same having been duly considered by the Court:

And the Court having thereafter, upon motion of the Pacific Livestock Company, a corporation, notice of which motion was first duly given by said Pacific Livestock Company to the defendant and said Miller & Lux, granted leave to said Pacific Livestock

Company to file a supplemental bill herein, making it a
65 party complainant in this suit, with the same rights and privileges as the original complainant, and with all benefit and advantage to said Pacific Livestock Company of all the pleadings and proceedings in this suit, the same as if it had been an original complainant herein, and said Pacific Livestock Company having thereupon filed its supplemental bill accordingly in this suit, and having thereby and by virtue of the order last above mentioned, become entitled to the benefit and advantage of the said motion of said Miller & Lux, for said injunction pendente lite:

And it appearing to the Court that said complainant Miller & Lux and Pacific Livestock Company are entitled to an injunction, pending this suit, according to the prayer of said original bill and said supplemental bill:

Now, therefore, it is hereby ordered, adjudged and decreed that said defendant, the Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them or any of them, be, and they are hereby enjoined and restrained from further prosecuting, as against said Miller & Lux or said Pacific Livestock Company, either of the two actions brought by said defendant, Rickey Land and Cattle Company, on the 15th day of October, 1904, in the Superior Court of the County of Mono, State of California, against said Miller & Lux, a corporation, and others,
66 as defendants, and respectively numbered 1055 and 1056 on the register of said Superior Court, and from taking any further step whatsoever in either of said actions as against said Miller & Lux or said Pacific Livestock Company, pending the final hearing and determination of this suit, and until the further order of this Court.

And it further appearing to the satisfaction of this Court that this injunction may be safely granted without requiring any bond from said Miller & Lux or said Pacific Livestock Company, it is further ordered that the writ of injunction may be issued herein as aforesaid without any bond being furnished by either said Miller & Lux, or said Pacific Livestock Company.

Dated June 25th, 1906.

THOMAS P. HAWLEY, *Judge*.

[Endorsed:] No. 791. In the Circuit Court of the United States for the District of Nevada. Miller & Lux, a corporation, Com-

plainant, v. The Rickey Land and Cattle Company, a corporation, Defendant. Order for Injunction Pendente Lite. Filed June 25th, 1906. T. J. Edwards, Clerk.

67 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation)
and MILLER & LUX (a Corporation), Defendants.

Petition for Appeal.

In the action originally commenced by Miller & Lux, a corporation, complainant, vs. The Rickey Land and Cattle Company, a corporation, defendant, in the Circuit Court of the United States, Ninth Circuit, District of Nevada, the Pacific Livestock Company, a corporation, was substituted as complainant in said action, and the title hereto is intended for the said action so commenced and now pending.

68 The above-named defendant, the Rickey Land and Cattle Company, a corporation, conceiving itself aggrieved by the interlocutory order and decree made on the 25th day of June, 1905, and entered on the 25th day of June, 1905, in the above-entitled cause, wherein it was ordered and decreed that the said defendant be enjoined and restrained from further prosecuting as against the Pacific Livestock Company, a corporation, and Miller & Lux, a corporation, either of the two certain actions brought by the defendant on the 15th day of October, 1904, in the Superior Court of Mono County, State of California, respectively numbered 1055 and 1056 on the register of actions of said Superior Court, and from taking any further steps whatever in either of said actions as against said Pacific Livestock Company, a corporation, and Miller & Lux, a corporation, pending the final hearing and determination of the said above-entitled suit and until the further order of said Circuit Court of the United States, Ninth Circuit.

And the said Rickey Land and Cattle Company, a corporation, prays that this, its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the records and proceedings and papers upon which said interlocutory decree, order and judgment was made, duly authenticated, may be sent to said United States Court of Appeals for the said Ninth Circuit.

69 And now, at the time of filing this petition for appeal, the said Rickey Land and Cattle Company, a corporation, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be argued in the United States Circuit Court of Appeals for the said Ninth Circuit.

And your petition- will ever pray.

RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President*,
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Defendant.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Petition for Appeal. Filed July 23, 1903. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

70 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation)
and MILLER & LUX (a Corporation). Defendants.

Assignment of Errors.

On the appeal from the order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause on the complaint of Miller & Lux, a corporation, complainant, wherein the Pacific Livestock Corporation, was afterwards substituted as complainant, which said order and decree enjoined and restrained the Rickey Land and Cattle Company, a corporation, from prosecuting two (2) certain actions in
71 the Superior Court of Mono County, State of California, against the said complainants, Miller and Lux, a corporation, and Pacific Livestock Company, a corporation, and said Rickey

Land and Cattle Company says, that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. That the prosecution of the actions in Mono County, State of California, enjoined by the order and decree appealed from would not in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the case of *Miller & Lux vs. T. B. Rickey* and others pending in the said Circuit Court at the time of the commencement of said actions in Mono County, and the said Circuit Court erred therefore in making said order and decree appealed from.

Second. That the issues to be tried in the said suits in Mono County, State of California were not the same issues as were to be or could be tried in the said case *Miller & Lux vs. T. B. Rickey* and others pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Third. That the Rickey Land and Cattle Company was not a party to the said action of *Miller & Lux vs. T. B. Rickey* and others in the Circuit Court of the United States, Ninth Circuit,
72 District of Nevada and would not be bound in any manner by any judgment or decree rendered in that court, the Court therefore erred in making said order and decree restraining said Rickey Land and Cattle Company from prosecuting said actions in the Superior Court of Mono County, State of California.

Fourth. That any judgment rendered in the said action of *Miller & Lux vs. T. B. Rickey* and others pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, could not affect, quiet or determine the title of the Rickey Land and Cattle Company to the waters or the use of the waters of the Walker River in the State of California and it was therefore error to enjoin and restrain the Rickey Land and Cattle Company from prosecuting the said actions in Mono County, State of California, to quiet the title of the said Rickey Land and Cattle Company to the said waters of the Walker River in the State of California.

Fifth. That the Circuit Court of the United States, Ninth Circuit, District of Nevada, was without jurisdiction to determine or quiet the title of the Rickey Land and Cattle Company, a corporation, to the waters of the Walker River in the State of California and the said Circuit Court erred therefore in enjoining the Rickey Land and Cattle Company from quieting its title in the Superior Court of Mono County, State of California.

Sixth. That the issues in the said action of *Miller & Lux*
73 *vs. T. B. Rickey* and others in the Circuit Court of the United States, Ninth Circuit, District of Nevada, were not the same issues as were to be tried in the Superior Court of Mono County, State of California, in the said actions, the prosecution of which were enjoined by said order and decree.

Seventh. That the said Rickey Land and Cattle Company was not a party complainant or defendant in the said action of *Miller & Lux vs. T. B. Rickey et al.*, pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and therefore the

said Circuit Court erred in restraining said Rickey Land and Cattle Company, a corporation, from prosecuting said actions in the Superior Court of Mono County, State of California.

Eighth. That the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try and determine the rights to the use of the waters of the Walker River in the State of California by T. B. Rickey, nor the title of T. B. Rickey, to the waters of the Walker River in the State of California, nor the use of the Rickey Land and Cattle Company, a corporation, to the waters of the Walker River in the State of California, in said action of Miller & Lux vs. T. B. Rickey and others and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of T. B. Rickey, to the use of said water and the rights

74 to the use of said waters, because said water was in the State of California and the use of said water and the diversion of said water was made by said T. B. Rickey and by the said Rickey Land and Cattle Company, his successor, in the State of California, and the water and the land upon which the use of the said water was made was all in the State of California and not in the State of Nevada and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of the Rickey Land and Cattle Company to the waters of the Walker River, or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River, as the successor of T. B. Rickey, and the Court erred therefore in rendering the order and decree restraining the appellant from prosecuting said actions in said Mono County.

Ninth. That the Circuit Court of the United States, Ninth Circuit, District of Nevada, had no jurisdiction to render said order and decree appealed from as against the appellant, Rickey Land and Cattle Company.

Tenth. That it was error for the said Circuit Court of the United States, Ninth Circuit, District of Nevada to make and render said order and decree appealed from.

Eleventh. That the said complaint upon which said interlocutory order and decree appealed from was granted does not state
75 facts sufficient to entitle the complainant to the said interlocutory decree.

Wherefore the appellant, Rickey Land and Cattle Company, prays that the decree of said Circuit Court of the United States, Ninth Circuit, District of Nevada, be reversed and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, be ordered to enter an order and decree dissolving the injunction and restraint made by the said order and decree appealed from.

[SEAL.]

RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President,*
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,

Solicitors for Said Corporation, Appellant.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Assignment of Errors. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 791.

MILLER & LUX (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

THE PACIFIC LIVESTOCK COMPANY (a Corporation), Complainant,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation) and
MILLER & LUX (a Corporation), Defendants.

Order for Appeal.

It is ordered that the appeal of the Rickey Land and Cattle Company, appellant in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, District of Nevada, from the interlocutory order and decree made in the above-entitled court on the 25th day of June, 1906, in the above-entitled cause, be, and the same hereby is allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

And it is further ordered that the bond on appeal be fixed at the sum of five hundred dollars (\$500) the same to act as a bond for costs and damages on appeal.

Dated San Francisco, Cal., July 23d, 1906.

WM. W. MORROW,

Circuit Judge.

[Endorsed:] No. 791. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Miller & Lux, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. The Pacific Livestock Company, a Corporation, Complainant, vs. The Rickey Land and Cattle Company, a Corporation, and Miller & Lux, a Corporation, Defendants. Order for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, No. 911 Laguna St., San Francisco, Cal.

Bond on Appeal.

Know all men by these presents, that we, Rickey Land and Cattle Company, a corporation, as principal, and S. Trask and H. C. Cutting, as sureties, are held and firmly bound unto Miller & Lux, a corporation, and the Pacific Livestock Company, a corporation, in the full and just sum of five hundred dollars, to be paid to the said Miller & Lux, a corporation, and the Pacific Livestock Company, a corporation, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of July, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Circuit Court of the United States, for the Ninth Circuit, District of Nevada, in a suit depending in said court between Miller and Lux a corporation, and the Pacific Livestock Company, a corporation, as complainants, and the Rickey Land and Cattle Company, a corporation, as defendant, an interlocutory order and decree was rendered against the said Rickey Land and Cattle Company, and the said Rickey Land and Cattle Company, a corporation, having obtained from said court an order allowing it to appeal to reverse the said order and decree in the aforesaid suit, and a citation directed to the said the Pacific Livestock Company, a corporation, and the said Miller & Lux, a corporation, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Rickey Land and Cattle Company, a corporation, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[CORPORATE SEAL.] **RICKEY LAND AND CATTLE CO., INC.,**

By **T. B. RICKEY, President.** [SEAL.]
S. TRASK. [SEAL.]
H. C. CUTTING. [SEAL.]

Acknowledged before me the day and year first above written.
 [SEAL.] **F. D. MONCKTON,**

*Clerk U. S. Circuit Court of Appeals
 for the Ninth Circuit.*

UNITED STATES OF AMERICA,
District of Nevada, ss:

S. Trask and H. C. Cutting, being duly sworn, each for himself, deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

S. TRASK.
H. C. CUTTING.

Subscribed and sworn to before me this 23d day of July, A. D. 1906.

[SEAL.]

F. D. MONCKTON,
*Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.*

[Endorsed:] No. 791. United States Circuit Court, District of Nevada, for the Ninth Circuit. Pacific Livestock Company, a Corporation, and Miller & Lux, a Corporation, Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Bond on Appeal. Form of Bond and Sufficiency of Sureties approved. Wm. W. Morrow, Judge. Filed July 23d, 1906. T. J. Edwards, Clerk.

Clerk's Certificate to Transcript.

DISTRICT OF NEVADA, ss.:

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing fifty-eight typewritten pages, numbered from 1 to 58 inclusive, are
a full, true and correct copy of the record and proceedings in
the cause therein entitled; and that the cost of the said record,
amounting to the sum of thirty-nine dollars and eighty cents,
have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 25th day of August, 1906.

[SEAL.]

T. J. EDWARDS, *Clerk.*

Citation on Appeal.

UNITED STATES OF AMERICA, ss.:

The President of the United States to Miller and Lux, a Corporation, and to its Solicitors, W. B. Treadwell and W. C. Van Fleet, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the District of Nevada wherein Rickey Land and Cattle Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant,
as in the said order allowing appeal mentioned, should not be
corrected, and why speedy justice should not be done to the
parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the United States Circuit Court, Ninth Circuit, this 23rd day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

Received copy of the within citation this 27th day of July, 1906.

W. B. TREADWELL,
W. C. VAN FLEET,
Per ISAAC FROHMAN,
Solicitors for Appellee.

[Endorsed]: No. 791. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Miller and Lux, a Corporation, Pacific Land and Livestock Company, Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

83

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Pacific Land and Livestock Company, a Corporation, and W. C. Van Fleet and W. B. Treadwell, its Solicitors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the Ninth Circuit, District of Nevada, wherein Rickey Land and Cattle Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the Ninth Circuit, this 23d day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

84 Received copy of the within citation this 27th day of July, 1906.

W. B. TREADWELL,
W. C. VAN FLEET,
Per ISAAC FROHMAN,
Solicitors for Appellee.

[Endorsed]: No. 791. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Pacific Land and Livestock Company and Miller and Lux, a Corporation, Complainants, vs. Rickey Land and Cattle Company, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

[Endorsed]: No. 1366. United States Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Company, a Corpo-

ration, Appellant, vs. Miller & Lux, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Nevada.

Filed August 29, 1906.

F. D. MONCKTON, *Clerk*.

85 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.

MILLER & LUX (a Corporation), Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-four (84) pages, numbered from one (1) to eighty-four (84) inclusive, to be a true copy of the printed Transcript of Record in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules and practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

86

No. 1366.

United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

*Proceedings Had in the United States Circuit Court of Appeals for
the Ninth Circuit.*

ADDENDA.

Upon Appeal from the United States Circuit Court for the District
of Nevada.

87 At a stated term, to wit, the October term A. D. 1906, of the
United States Circuit Court of Appeals for the Ninth Cir-
cuit, held at the courtroom, in the City and County of San Fran-
cisco, on Tuesday, the thirtieth day of October, in the year of our
Lord one thousand nine hundred and six. Present: The Hon-
orable William B. Gilbert, Circuit Judge; Honorable Erskine M.
Ross, Circuit Judge.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Order of Submission.

Ordered, appeal argued by Mr. James F. Peck, counsel for the ap-
pellant, and Mr. W. B. Treadwell, counsel for the appellee, and sub-
mitted to Gilbert and Ross, Circuit Judges, and Wolverton, District
Judge, for consideration and decision.

88 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Upon Appeal from the United States Circuit Court for the District
of Nevada.

Opinion of U. S. Circuit Court of Appeals.

Walker River is a stream flowing from within the State of Cali-
fornia easterly into the State of Nevada. Towards its source it di-

vides into two branches, known as the East and West Forks. The junction is in the State of Nevada. The appellant and the appellee are each incorporated, the former having its residence in the State of California, and the latter in the State of Nevada. On the 10th of June, 1902, the appellee filed its bill of complaint in the Circuit Court of the United States for the District of Nevada, against Thomas B. Rickey and many other persons. Service of process was

had upon Rickey, who thereafter, appeared and answered. 89 By said bill of complaint it was alleged, among other things, that complainant therein (the appellee here) was then, and for a long time prior thereto had been, the owner and seised in fee, and in actual possession, of certain lands situated in the County of Lyon, State and District of Nevada, particularly describing them; that Walker River is a natural stream and watercourse, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, which said lands include the banks, bed, and stream of said river; that at divers times, in said bill set forth, the complainant, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters thereof, amounting in all to a flow of 943.29 cubic feet of water per second, and had carried the same to and upon certain lands, and used the same for the irrigation thereof, and that said complainant was then the owner by such appropriation of certain interests in the waters of said river; such interests being particularly set forth and enumerated. It was then further alleged that Rickey, and other defendants in the suit, had diverted the waters of said Walker River at divers places above the lands of the complainant, and above the points at which complainant so diverted said water, and that a large portion of the water so diverted by the defendant in said suit was never

returned to the stream, and that such defendants were continuing the diversion aforesaid, and had thereby deprived, 90 and were depriving, such complainant of a large portion of said water to which it was so entitled; that each of said diversions so made by such defendants was without right, but that they had diverted said water, and were so diverting the same, under claim of right so to do, adversely to the complainant; that by such diversions complainant had been and was being deprived of sufficient water to irrigate its said lands, and was thereby rendered unable, and so long as said diversions were continued would be unable, to irrigate such lands, which it had theretofore been accustomed to irrigate, and was thereby rendered unable, and would be unable, properly or successfully to cultivate the same, or to raise crops thereon. And it was further alleged that if said defendants, or either of them, had any right to divert any water from the said river, such rights, and each of them, were subsequent and subordinate to the aforesaid appropriations so made by complainant, and its grantors and predecessors. The prayer was that the defendants in said suit, including Rickey, be enjoined and restrained from diverting any water from Walker River in subversion of the rights of complainant.

Subsequently, on the 15th day of October, 1904, the Rickey Land

91 & Cattle Company commenced an action in the Superior Court of the County of Mono, State of California, against the appellee and a large number of other persons, by filing a complaint in said court, whereby it was alleged, among other things, that the said company was, and had been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of certain lands conveyed to it by Thomas B. Rickey, all situated in the State of California, and that the same constituted an entire contiguous body of land, over, through, and upon which flowed, and from time immemorial had flowed, a branch or tributary of Walker River called the West Fork, and that said lands and all thereof were, and from time immemorial had been, riparian to said stream, and situated along and bordering thereupon; that the said company was the owner, in possession, and entitled to the possession of such lands, and had the right to divert and appropriate all the waters of said West Fork of Walker River, and its tributaries in the State of California, to the extent of a constant flow of 1575 cubic feet of water per second. It was further alleged that the defendants in said action, and each of them, including the appellee herein, claimed some right, title and interest adverse to the said Rickey Land and Cattle Company, in and to said constant flow of 1575 cubic feet of water per second, or some part or portion thereof;

92 that said right, title, and interest so claimed by such defendants, and each of them, including the appellee, in and to said water, was without right, and that all claims of them, and each of them, to the waters of said West Fork of said Walker River were subordinate and subject to the ownership of said company, and its alleged right to divert and appropriate from said West Fork of Walker River a constant flow of the amount of water specified. The prayer was that the Rickey Land and Cattle Company be decreed to be the owner of the amount of water specified, and entitled to the use and enjoyment of the same, and that appellee and the other defendants therein, be subordinated to the interests of the said company in the flow of the water of said West Fork of Walker River.

On the same day—October 15, 1904—the Rickey Land and Cattle Company commenced another action of like character, in the same court, involving 504 cubic feet of water in the East Fork of Walker River, claimed under similar rights, and it was alleged that all of such rights were superior to the rights of defendants therein, including appellee whatever they might be.

The bill of complaint herein sets forth all these facts and proceedings, and further shows that, after appellee had filed its bill of complaint in the Circuit Court of the United States for the District of Nevada, and after Rickey had appeared and filed his answer therein, he (Rickey), on August 6, 1906, organized and incorporated the Rickey Land and Cattle Company, and conveyed to it all the lands and water rights thereafter claimed by it in the two actions commenced in the Superior Court of Mono County, in the State of California. Then follows the allegation: "That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orator

and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suit." The prayer is that the defendant be enjoined from prosecuting either of the actions commenced in Mono County, State of California, against the complainant, and for general relief.

The cause having been heard upon the bill and certain affidavits filed in defense, a temporary restraining order was directed to issue, and the appeal is from the action of the court in this regard.

The record contains a supplemental complaint by the Pacific Live Stock Company, showing that it has succeeded to the interests of the appellee, but such complaint serves no essential purpose in the present controversy.

James F. Peck and Charles C. Boynton, for Appellant.

W. C. Van Fleet and W. B. Treadwell (Frohnman & Jacobs and Frank H. Short, of Counsel), for Appellee.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

WOLVERTON, District Judge, delivered the opinion of the court:

Let us inquire, first, touching the nature of the suit instituted by the appellee as complainant against Rickey and others, in the Circuit Court of the United States for the District of Nevada, June 10, 1902, for the inquiry will settle the jurisdiction of the court to proceed in that cause, and in one aspect will determine its authority to grant the relief demanded in this cause. In the course of the inquiry, it is important that we first ascertain the nature of the subject-matter of the cause.

Says the Court in the case of *Lower Kings River Water Ditch Co. vs. Kings River and Fresno Canal Co.*, 60 Cal. 408:

"A watercourse consists of bed, banks and water." (Angell on Watercourses, sec. 4.) The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its watercourse. Granting that plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. (Civil Code, 658.) If the watercourse, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto."

So in *Construction Co. vs. Ditch Co.*, 41 Or. 209, 215:

"If the riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which becomes thereby the dominant estate, and the grant an incorporeal hereditament. If title be acquired by prescription, the estate and the right are the same."

So also in *Wyatt vs. Larimer & Weld Irr. Co.*, 33 Pac. 144, Mr. Justice Goddard, speaking for the Court, says:

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot well be disputed." And, after citing *Washburn on Easements and Servitudes* and *Angell on Water-courses*, proceeds: "The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his use."

And, generally, it is held that:

"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and coextensive with his right to the ditch itself."

Willey vs. Decker, 73 Pac. 210, 225.

Smith vs. Demiff, 60 Pac. 398.

Or, putting it in another form, that:

97 "A right to divert and use the waters of a stream, acquired by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made.

Conant vs. Deep Creek & Curlew Val. Irr. Co., 66 Fed. 188.

See, also:

Simmons vs. Winters, 21 Or. 35.

Hindman vs. Rizer, 21 Or. 112.

Bear Lake & River Waterworks & Irrigation Co. vs. Ogden City, 8 Utah, 494.

Tucker vs. Jones, 8 Mont. 225.

Sweetland vs. Olsen, 11 Mont. 27.

Cave vs. Crafts, 53 Cal. 135.

So it follows, as a deduction from these principles, as was said in the *Conant* case, that:

"An action, therefore, to quiet the title and determine and to establish the right to divert and use water for such purposes is in the nature of an action to quiet the title to real estate."

Under the bill there is the assertion of a valid appropriation of the waters of Walker River, for use upon lands in Nevada which are specifically described, and which the complainant owns, and the further averment that the defendants claim a right of diversion and appropriation adverse to that which complainant has acquired, and the prayer is, in effect, that defendants be restrained from the exercise of their alleged right to the injury of complainant.

98 Could there be a plainer case of an attempt to quiet title to the appropriation itself? Although the right to have the water of Walker River flow from above down to and within the

complainant's canals and ditches, for use upon its lands, is an incorporeal hereditament, it is, nevertheless, under the foregoing authorities, appurtenant to the realty in connection with which the use is applied. It savors of and is a part of the realty itself. The suit, therefore, in its purpose and effect, is one to quiet title to realty. Complainant's diversion being in Nevada, and the use being upon realty situated in Nevada, and the suit being one concerning or pertaining to that realty, it is necessarily local in character, and was properly instituted in the State of Nevada. See *Conant vs. Deep Creek etc. Company*, supra. The proposition seems so clear that it is scarcely necessary to cite other authorities in its support. And it is equally clear that the courts of one State are without jurisdiction to hear and determine suits instituted in another, for the adjustment of adverse claims respecting the legal title to realty, and which pertain to the realty as the subject-matter of the controversy.

There has been much discussion of the legal principle that, as to certain causes arising partly in one jurisdiction and partly in another, the right of action will be entertained in either jurisdiction. The principle is that, where two material facts are necessary to give a good cause of action, and they take place in different jurisdictions, the cause may be said to have arisen in either jurisdiction. Numerous authorities are cited in support of this principle, among which are the following:

"When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other." *Com. Dig. "Action," N., 11.*

"Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either." 1 *Saund. Pl. & Ev.* 413.

"Supposing the foundation of the action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offense, the plaintiff may, ex necessitate, lay the venue in either." *Ashurst, J., in Scott vs. Brest*, 2 *Term R.* 238.

And "when matter in one county is depending upon the matter in the other county, there the plaintiff may choose in which county he will bring his action;" and: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage."

Bulwer's Case, 7 *Coke*, 1.

So, in *Barden vs. Crocker*, 10 *Pick.* 383, in an action brought in the county where the property was damaged for diversion of water in another, it was held that the action could be maintained in either county. So, also, in the case of *Foot vs. Edwards* (*Fed. Cas. No. 4,908*), an action for damages for an injury to the mill property of the plaintiff situated in Massachusetts, that the action

could be maintained in Connecticut, where the water was diverted to the injury of the mill. And, again, in the case of *Rundle vs. Delaware & R. Canal* (1 Wall. Jr. 275), an action was sustained in New Jersey "for damage done to plaintiff's realty in Pennsylvania." These authorities pertain to actions at law.

The general doctrine of the common law is that an action for injury to real property, as trespass, or case for nuisance, is local, and must be commenced within the county or district in which the land lies. *Watts' Administrators vs. Kinney*, 23 Wend. 484. This seems to be controlled, however, by the rule above referred to, that where an act has been committed in one jurisdiction which causes injury to realty in another, a suit may be brought in either. In further support of the latter proposition, Mr. Gould is authority.

He says:

101 "If, however, a tortious act, committed in one county, occasions damage to land or any other local subject, situate in another, an action for the injury thus occasioned may be laid in either of the two counties, at the choice of the party injured. Thus, if, by the diversion or obstruction of a watercourse in the county of A., damage is done to lands, mills, or other real property in the county of B., the party injured may lay his action in either of those two counties." Gould, Pl., p. 105, Sec. 108.

In case of nuisance, however, where it is sought to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is quasi in rem, and must act upon the thing itself which is causing the damage. This was held in the case of *Stillman vs. White Rock Manufacturing Co.*, Fed. Cas. No. 13,446 (23 Fed. Cases, p. 83).

There is but little question that the same rule as to venue in the commencement of suits in equity will apply, as in actions at law. It is of primary importance, however, that a cause in equity exist, for, unless it does, the suit cannot be maintained anywhere. A suit may be local or transitory, as well as an action at law; and, if a suit pertains to or is concerning realty as the direct subject-matter of the inquiry, like an action at law in ejectment, it must be commenced in the jurisdiction where the realty is located. But

102 if jurisdiction rests upon an equitable cause, such as multiplicity of suits, irreparable injury, specific performance, rescission, or the like, the suit need not necessarily be local. It may be transitory as actions are transitory, and if the appropriate conditions are present, the suit may be brought as actions may be brought, in either jurisdiction, and are therefore governed by the same principle. But, as we have heretofore determined, the present suit is one affecting realty, and was, therefore, local, and for this reason the venue was properly laid in the State of Nevada.

It is well determined that, "in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

Massie vs. Watts, 6 Cranch, 148.

Or, as expressed in general terms in the case of *Phelps vs. McDonald*, 99 U. S. 298, 308, that:

"Where the necessary parties are before a court of equity it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him.

103 Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam."

This rule "has been often applied," says the Court, in *Cole vs. Cunningham*, 133 U. S. 107, 119, "by the courts of the domicile against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others."

If such be the law where the res is without the jurisdiction of the court, by how much stronger will be its application where the jurisdiction extends over the res as well as to the person. So that the Court, having jurisdiction of the res, that is, of the thing in controversy, which is the realty in the present instance, has undoubted authority and jurisdiction, having also jurisdiction of the person, to protect the thing against the encroachments of the person, whether those encroachments come from within the State or without.

The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the Court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will

104 not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant cannot defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the Court in Nevada has not the power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and de-

termine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then, to settle and quiet complainant's title and rights thereto.

105 That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary state or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. How-

106 ell vs. Johnson, 89 Fed. 556; Hoge vs. Eaton, 135 Fed. 411; Anderson vs. Bassman, 140 Fed. 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State cannot operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of Anderson vs. Bassman, *supra*:

"It is objected by the defendants," says Morrow, Circuit Judge, "that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State."

And the decision was against the contention. So the decision here must be against appellant's contention upon the point urged.

That the present bill is ancillary to the original suit instituted in the Circuit Court for the District of Nevada is not questioned. It is not infrequent that the State courts come in conflict with the Federal courts, and vice versa of the Federal with the State, and this where they exercise concurrent jurisdiction. In all such cases

107 it has been firmly established that the court first acquiring jurisdiction of the subject matter of the action or suit, and of the parties, is entitled to maintain it until the controversy is at an end, and the rights of the parties are fully admin-

istered, without interference from, and to the exclusion of the other. *Pitt vs. Rodgers*, 104, Fed. 387; *Starr vs. Chicago, R. I. & P. Ry. Co.*, 110 Fed. 3. In the maintenance of such jurisdiction, it is a common remedy to invoke the injunctive process, not against the court offending, but against the parties, to restrain them from proceeding therein in antagonism to the jurisdiction first acquired; and the remedy is available either before or after judgment or decree, either to enable the Court to render an effective adjudication, or to command full obedience to its mandates. In support of the doctrine generally, we quote from three of the authorities out of many that may be cited. In *Peck vs. Jenness*, 7 Howard, 612, 624, the Court says:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have
108 their foundation, not merely in comity, but on necessity.

For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

So in *Root vs. Woolworth*, 150 U. S. 401, 410:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments, which remain unreversed, when the subject matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in *Story's Equity Pleading* (9th ed.), sec. 338: 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defense made to it; or to bring forward parties before the court, or it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental
bill is brought in aid of a decree, it is merely to carry out
109 and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the Court.'"

And again, in *French, Trustee, vs. Hay*, 22 Wall. 250, Mr. Justice Swayne speaking for the Court:

"It (the bill then pending) is auxiliary and dependent in its character, as much so as if it were a bill of review. The Court having jurisdiction in personam had power to require the defend-

ant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal."

The case relied upon by counsel for appellant—*Oliver vs. Parlin & Orendorff*, 105 Fed. 272—is in harmony with these authorities; but there the Federal court had not acquired previous jurisdiction over the person of the Groesbeck National Bank, which it was sought to enjoin.

110 The doctrine being thus established, and the jurisdiction of the Federal court in the present case having first attached, section 720 R. S. is without application. As it well known, this section inhibits the granting of a writ of injunction by a Federal court to stay the proceedings of a State court.

"It is well settled," says Mr. Bates, in his work on Fed. Equity Pro., sec. 541, "upon both reason and authority, that the prohibition contained in this statute 'does not apply where the Federal court has first obtained jurisdiction, or where the State court, having first obtained jurisdiction, the case has been removed to the Federal court. In such cases the Federal court may restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction has first attached.' If the rule were otherwise, 'after suit brought in a Federal court, a party defendant could, by resorting to a suit in a State court, defeat, in many ways, the effective jurisdiction and action of the Federal court, after it had obtained full jurisdiction of person and subject matter.'"

The appellant, the Rickey Land and Cattle Company, has succeeded to all the interest of Rickey, in so far as such interest affects and pertains to the subject matter of the controversy in the case of *Miller & Lux vs. Rickey et al.*, pending in the U. S. Circuit Court in Nevada. The position is so apparent from

111 Rickey's own affidavit as to put at rest all contention about it. He says: "That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his right, title and interest to certain water rights, and rights to the use of water; and said water rights, and rights to the use of water are in part the water rights, and rights to the use of water described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said lands by Thomas B. Rickey, and said water rights, and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle

Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusively and peaceably."

The affiant attempts to show wherein the rights that the Rickey Land and Cattle Company now claim are different from those which were conveyed and transferred to it by Rickey himself, and in that attempt it is significant that he shows that whatever difference exists at the present time between the two rights is the result of what the company has done since its acquirement from Rickey, that is, in the way of continuing and increasing Rickey's alleged original appropriations of water, but not to the extent of acquiring any new or different rights, by adverse holding and possession, or otherwise. In other words, the company has merely builded upon the rights obtained from Rickey, without acquiring any new or additional rights. These are the rights that the Rickey Land and Cattle Company is seeking to establish in the Superior Court of Mono County, California, against which it is maintained that the rights of the appellee are adverse and subordinate, and the same rights which the appellee asserts are subordinate to those that it has acquired and is possessed of and owns; so that the issues must needs be the same, and the controversy the same, whether Miller & Lux, the appellee goes into the Mono County Superior Court, or the Rickey Land and Cattle Company makes the defense in the United States Circuit Court for the District of Nevada. The Nevada court, therefore, having first acquired jurisdiction, may maintain and exercise it to the end, to the exclusion of the State court in Mono County.

The next and final question relates to the doctrine of *lis pendens*, and its application here. As to this, there need be but little said. In the case of *Mellen vs. Moline Iron Works*, 131 U. S. 352, 371, the Court says:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the Court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*. *Eyster vs. Gaff*, 91 U. S. 521, 524; *Union Trust Co. vs. Inland Navigation and Improvement Co.*, 130 U. S. 365; 1 Story's Eq. Jur., sec. 403; *Murray vs. Ballou*, 1 Johns. Ch. 533. As said by Sir William Grant, in *Bishop of Winchester vs. Paine*, 11 Ves. 194, 197, the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be indeterminate; or, which would be the same in effect, it would be in the

114 pleasure of one party at what period the suit should be determined.' The present proceeding is an attempt, upon the part of a purchaser pendente lite, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice."

The text of 2 Black on Judgments, sec. 550, seems authoritative. It is as follows:

"It is a general rule that a purchaser of property, * * * who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit, the same as if made a party of record. * * * 'We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased bona fide, and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record. The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset.' * * *

115 In a late case it is said that the purpose of the rule is to keep the subject matter of the litigation within the power of the Court until judgment or decree shall be entered, since, otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seems to be indispensable to give effect to the doctrine of lis pendens: (1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so definite in the description that anyone reading it can learn thereby what property is intended to be made the subject of litigation."

The conditions present meet every requisite of these authorities. As is apparent from the record, the Rickey Land and Cattle Company came into the property and rights of Thomas B. Rickey after the suit to quiet title was begun in the Circuit Court for the District of Nevada, and after Rickey had answered therein, and the Court had acquired full and complete jurisdiction, both over the subject matter of the suit and over the person of Rickey. So that the Rickey Land and Cattle Company stands in privity of title with Rickey, and can claim nothing beyond what Rickey could have claimed in the original suit. The company is bound as Rickey would have been bound, and must abide the termination of such

116 suit for the adjustment of the adverse rights claimed to the appropriation of water from Walker River.

These considerations lead to the affirmance of the decree of the Circuit Court, and it is so ordered.

[Endorsed:] No. 1366. U. S. Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Co. vs. Miller & Lux (a Corporation). Opinion. Filed March 4, 1907. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Decree of U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Nevada.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nevada, and was duly submitted.

117 On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order or decree of the said Circuit Court appealed from in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Decree. Filed and entered March 4, 1907. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1900, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the twentieth day of May, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

118 *Order Denying Petition for Rehearing, etc.*

Ordered, petition for a rehearing, heretofore filed herein, denied.

Upon motion of Mr. Charles C. Boynton, counsel for the appellant, ordered, issuance of mandate of this Court in the above-entitled cause stayed for the period of ten (10) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
MILLER & LUX (a Corporation), Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-three (33) pages, numbered from one (1) to thirty-three (33), inclusive, to be a true copy of all proceedings had in the above-

entitled case in the said the United States Circuit Court of
119 Appeals for the Ninth Circuit, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals,
Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

120 UNITED STATES OF AMERICA, *vs.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rickey Land and Cattle Company is appellant, and Miller & Lux (a corporation) is appellee, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Nevada, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United

121 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

122 [Endorsed:] File No. 21,049. Supreme Court of the United States. No. 646, October Term, 1907. Rickey Land & Cattle Co., vs. Miller & Lux. Docketed. No. 1366, United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

123 United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY, Appellant,

vs.

MILLER & LUX (a Corporation), Appellee.

On Appeal from the Circuit Court of the United States for the District of Nevada.

Stipulation.

Whereas the Supreme Court of the United States has heretofore duly issued its writ of certiorari directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit directing said Judges to send without delay to the said Supreme Court of the United States the record and proceedings in the above entitled cause;

Now, therefore, it is hereby stipulated by and between the attorneys of record for the respective parties above-named that the certified transcript of record heretofore filed in the Supreme Court of the United States in connection with and in support of the petition for said writ of certiorari, the same being docketed as No. 646 of October Term, 1907, shall be taken and considered as the transcript of the record and proceedings remaining in the Circuit Court of Appeals for the Ninth Circuit as though the same had been returned in obedience to said writ of certiorari.

JAMES F. PECK,

CHAS. C. BOYNTON,

Attorneys for Appellant.

W. B. TREADWELL,

Attorney for Appellee.

FRANK L. SHORT,

FROHMAN & JACOBS,

Of Counsel for Appellee.

124 (Endorsed:) Docketed No. 1366. United States Circuit Court of Appeals, Ninth Circuit. Rickey Land & Cattle Co., Appellants, vs. Miller & Lux, (a Corporation), Appellee. Stipulation as to Return of Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Chas. C. Boynton, Attorney at Law, 1064 Mills Building, San Francisco, Cal.

125 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
MILLER & LUX, a Corporation, Appellee.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next two preceding pages, numbered one (1) and two (2), to be a true copy of a "Stipulation as to Return to Writ of Certiorari" filed in the above-entitled cause on the twenty-fifth day of March, A. D. 1908, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

126 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1366.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
MILLER & LUX, a Corporation, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for

the Ninth Circuit, at the city of San Francisco, in the State of California, this 2nd day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] 646. 21049.

127 [Endorsed:] File No. 21,049. Supreme Court U. S. October Term, 1909. Term No. 89. Rickey Land & Cattle Co., Petitioner, vs. Miller & Lux. Writ of Certiorari & return. Filed May 18th, 1908.

Office Supreme Court, U. S.
FILED.

MAR 2 1908

JAMES H. MCKENNEY,
CLERK.

No. ~~648.~~ ~~303~~ ~~80~~

IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

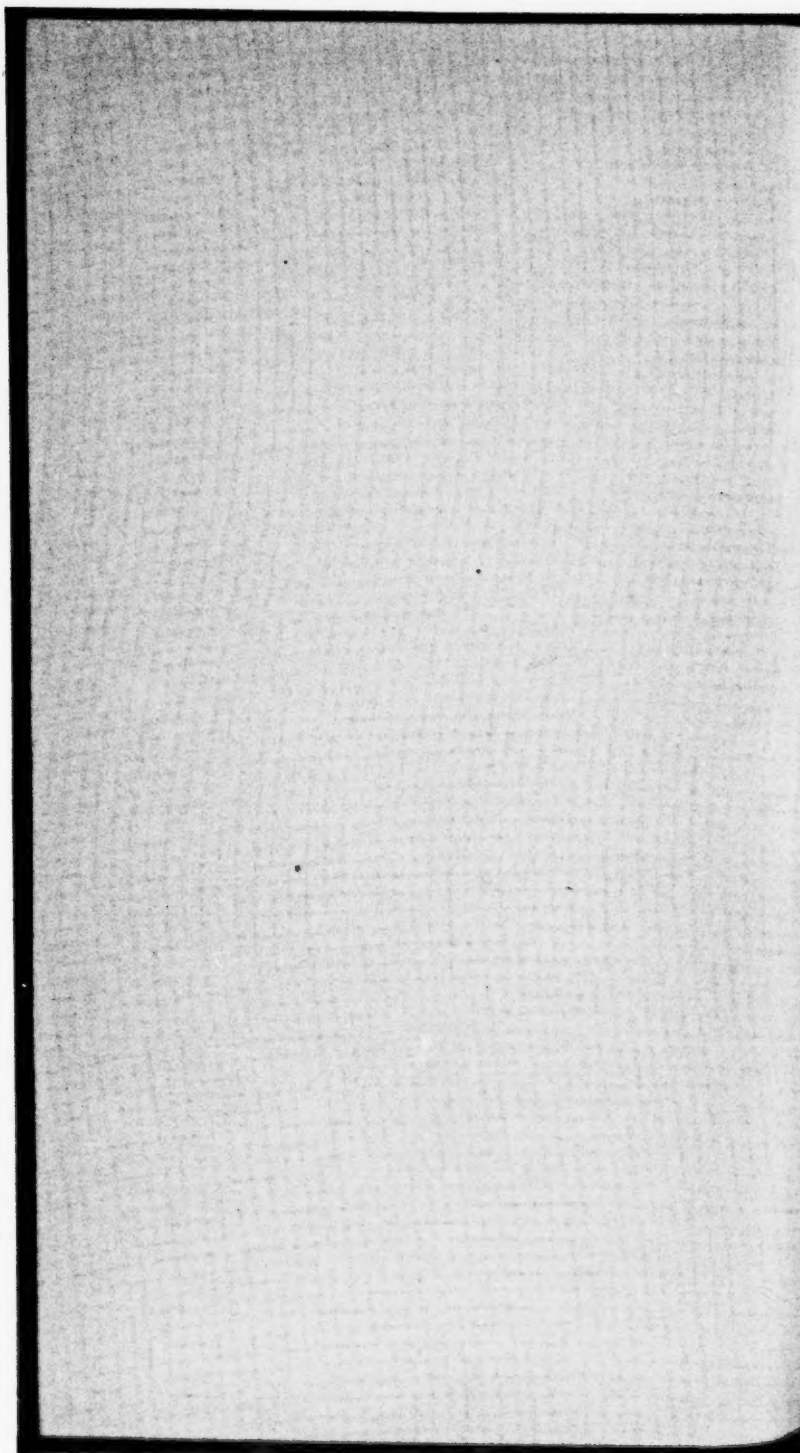
RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

MILLER & LUX (a Corporation),
Respondent.

**MOTION FOR WRIT OF CERTIORARI
AND NOTICE OF MOTION.**

F. D. MCKENNEY,
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND & CATTLE CO.

(A CORPORATION),

Petitioner,

vs.

MILLER & LUX (A CORPORATION),

Respondent.

MOTION FOR WRIT OF CERTIORARI FROM THE SUPREME
COURT OF THE UNITED STATES TO THE CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

Comes now the Rickey Land & Cattle Co., a corporation, by its counsel appearing in that behalf, and moves this Honorable Court that it shall, by certiorari, or other proper process, directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals

lately pending, wherein the respondent, Miller & Lux, was appellee, and your petitioner, Rickey Land & Cattle Co., was appellant, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

-----**F. D. MCKENNEY,**-----

Counsel for said Petitioner for the Purpose of
this motion.

IN THE SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM.

RICKEY LAND & CATTLE CO. (A CORPORATION),	} <i>Appellant,</i>
vs.	
MILLER & LUX (A CORPORATION),	
	} <i>Respondent.</i>

NOTICE OF APPLICATION TO THE SUPREME COURT OF
THE UNITED STATES FOR WRIT OF CERTIORARI.

*To Miller & Lux, a corporation, Appellee, and to
W. B. Treadwell, Frank H. Short, and Frohman
& Jacobs, its counsel:*

Please take notice that on Monday, the 2nd day of March, 1908, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that the Rickey Land & Cattle Company, a corporation, appellant, will, upon its verified petition and a copy of the entire record in this cause, submit a motion, a copy of which and of the petition

for writ of certiorari and brief in support thereof,
are herewith delivered to you, to the Supreme Court
of the United States, in its court room, at the Cap-
itol in the City of Washington, D. C. **F. D. MCKENNEY,**

JAMES F. PECK,
CHARLES C. BOYNTON,
Solicitors for Appellant.

The foregoing notice is hereby accepted and de-
livery of a copy thereof and of the petition for a
writ of certiorari and brief in support of petition
are hereby acknowledged, and it is hereby stipulated
and agreed that the said motion may be submitted
to the Court on Monday, the 2nd day of March,
1908.

W. B. TREADWELL,
FRANK H. SHORT,
FROHMAN & JACOBS,
Solicitors for Miller & Lux, Appellee.

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Office Supreme Court

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JAMES H. MCKENNEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE COMPANY
(a Corporation),

Petitioner,

vs.

MILLER & LUX (a Corporation),

Respondent.

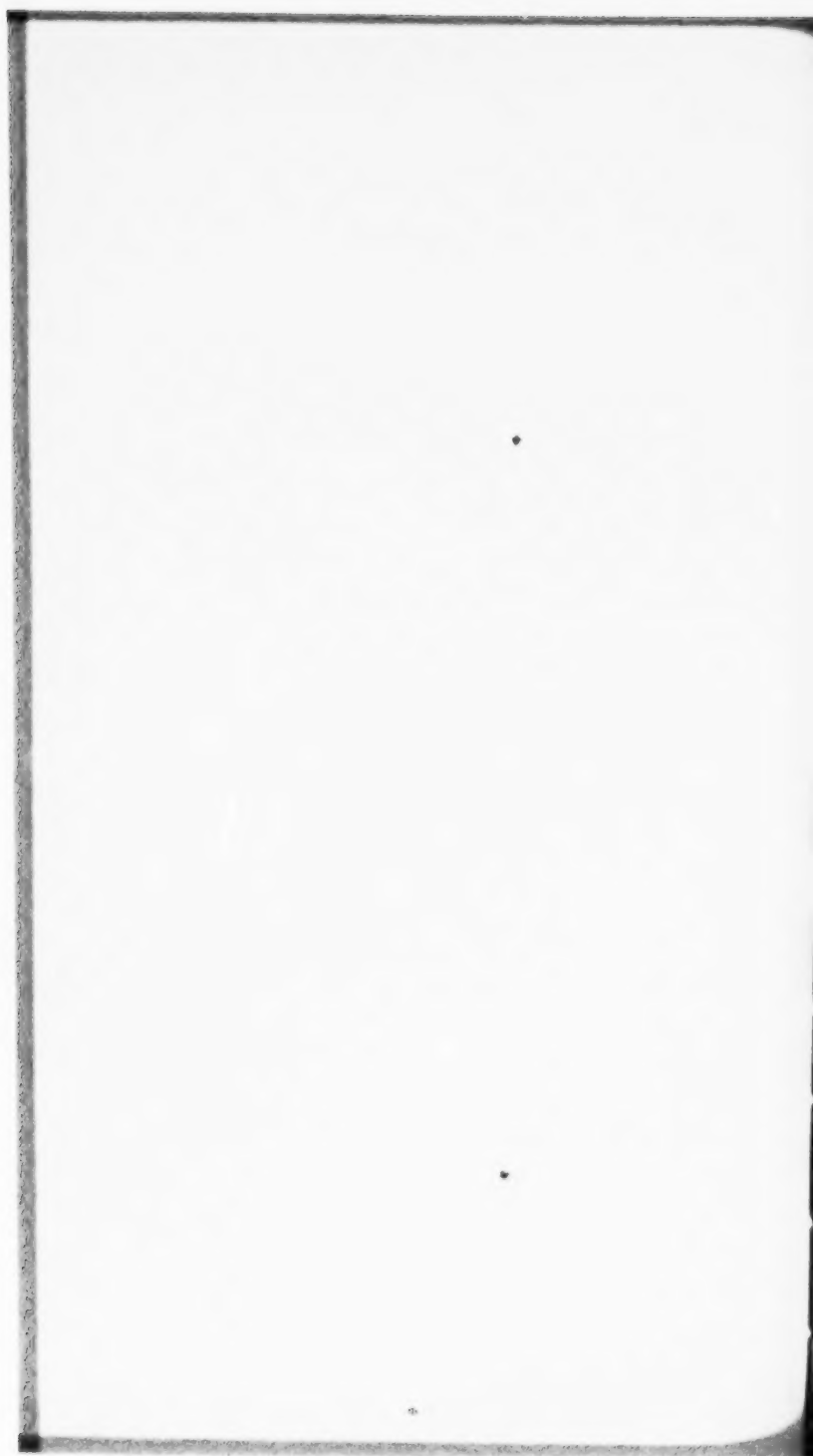
Petition for Writ of Certiorari.

F. D. MCKENNEY

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Petitioner.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE
COMPANY (a Corporation),

Petitioner,

vs.

MILLER & LUX (a Corporation),

Respondent.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Rickey Land and Cattle Company, a corporation, respectfully shows to this Honorable Court as follows:

I.

That at all times since the 6th day of August, 1902, your petitioner has been, and now is, a corporation created and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the State of Nevada; that at all times

since June 10th, 1902, and for a long time prior thereto, and now, Miller & Lux was and is a corporation created and existing under and by virtue of the laws of the State of California.

II.

That on the 10th day of June, 1902, a bill of complaint was filed in the Circuit Court of the United States for the District of Nevada by said Miller & Lux, respondent, against one Thomas B. Rickey and one hundred and thirty-seven other defendants, to procure a decree of said Circuit Court of the United States for the District of Nevada, enjoining and restraining said Thomas B. Rickey and said one hundred and thirty-seven other defendants from diverting the water flowing in the channel of the Walker River.

In said bill of complaint it was alleged by the complainant, that each of the defendants was diverting water from the channel of the Walker River "*under a claim of right so to do made by each of said defendants.*"

The complainant in said suit alleged that said complainant had owned and possessed, and was entitled to a superior and prior right as against each defendant to the flow of nine hundred and forty-three and twenty-nine one-hundredths (943.29) cubic feet per second of the water flowing in the channel of the Walker River, for use upon certain lands in the State of Ne-

vada, in the complaint described, and alleged in said complaint, that said water had been so used on said land from the time prior to the use of any water from said river by either of said defendants, and the subpoena *ad respondendum* was issued and served upon all of the defendants.

III.

Defendant Thomas B. Rickey, in the action commenced in the Circuit Court of the United States on the 10th day of June, 1902, as aforesaid, filed on the 4th day of August, 1902, the plea of said Thomas B. Rickey to the jurisdiction of the United States Circuit Court for the District of Nevada, and in support of said plea alleged that the said Walker River was a natural water course, arising in and flowing through the eastern part of the State of California, into and through the western part of the State of Nevada; and further alleged in said plea to the jurisdiction that all diversions of water from said Walker River made by said Thomas B. Rickey were at all times made in the State of California, and that the water so diverted was used for the irrigation of lands owned by said defendant Thomas B. Rickey, situate in the State of California, and that said lands, upon which said water was so used, were wholly outside of the State of Nevada, and said Thomas B. Rickey, in said plea, disclaimed any right to divert any of the waters of Walker River after the said waters had flowed in

said River into the State of Nevada, and in said plea it was asserted that because of said facts the said United States Circuit Court for the District of Nevada had no jurisdiction to try and determine the rights of said Thomas B. Rickey to the waters of said Walker River in the State of California, or to enjoin the alleged diversion of water by said Thomas B. Rickey, or to enjoin or restrain said Thomas B. Rickey from committing the alleged trespasses outside of the territorial limits of the State of Nevada. Said plea came on for argument before said United States Circuit Court for the District of Nevada, and after argument was overruled.

See the opinion of said Court in *Miller & Lux vs. Rickey et al.*, 127 Federal Reporter, 573.

IV.

That said defendant Thomas B. Rickey, together with other persons, did, on the 6th day of August, 1902, organize the corporation Rickey Land and Cattle Company, petitioner herein; that after the organization of said corporation, Rickey Land and Cattle Company, on the said 6th day of August, 1902, said Thomas B. Rickey did transfer and convey by deeds of conveyance properly executed, and acknowledged to the corporation Rickey Land and Cattle Company, all his lands, water and water rights, and rights to the use of water in said Walker River in the State of California.

That said Walker River in the State of California flowed through said lands so conveyed by said Thomas B. Rickey to the Rickey Land and Cattle Company in its natural channel, and the said lands so conveyed formed the bed and banks of the said Walker River.

That from time immemorial the said Walker River has been, and now is, a natural stream with well defined bed and banks, and the said lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company were riparian to said Walker River.

V.

That said Walker River is, and from time immemorial has been, a natural stream, or water course, having its source in two branches, known as the East Fork of the Walker River and the West Fork of the Walker River. That both of said branches have their sources in the State of California, and from thence flow through the eastern part of the State of California, into and through the western part of the State of Nevada, and said two branches of said Walker River unite in said State of Nevada above the place where it is alleged, in said complaint filed by Miller & Lux on the 10th day of June, 1902, that Miller & Lux diverts water from said Walker River.

VI.

That on the 15th day of October, 1905, the said Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court of Mono County, State of California, against one hundred and sixty-six (166) defendants, including Miller & Lux, the complainant in said action commenced in the United States Circuit Court for the District of Nevada, on the 10th day of June, 1902.

That said action was commenced by the filing of a complaint by said Rickey Land and Cattle Company in said Superior Court of Mono County, in which said complaint said Rickey Land and Cattle Company alleged that the said Rickey Land and Cattle Company had been since the 6th day of August, 1902, the owner, and in possession, and entitled to the possession of certain lands in the State of California, which said lands were the lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company; and in said complaint it was further alleged that the said lands constituted one entire, continuous body of land over and through, and upon which said West Fork of the Walker River flows, and from time immemorial has flowed; and that said lands, and all thereof, are, and from time immemorial have been, riparian to said West Fork of the Walker River, situate along and bordering upon said West Fork of the Walker River.

And it was further alleged in said complaint filed in Mono County, State of California, that said Rickey Land and Cattle Company, petitioner herein, is the owner of, in possession of and entitled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of said West Fork of the Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, for use upon said lands in the State of California, riparian to said West Fork of the Walker River; and it was further alleged that each of said one hundred and sixty-six (166) defendants in said action, including said defendant Miller & Lux therein, claims some right, title and interest adverse to the Rickey Land and Cattle Company, complainant in said action in Mono County, in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River in the State of California; and it was further alleged in said complaint in Mono County that said right, title and interest in and to said water so claimed or asserted by each of said defendants, including said Miller & Lux herein, is without right, and that all claims of each of said defendants, including said Miller & Lux, to the waters of said West Fork of the Walker River are subordinate and subject to the said alleged ownership of said Rickey Land and

Cattle Company and its right to divert and appropriate from said West Fork of said Walker River in the State of California a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, for use upon its said lands riparian to said West Fork of said Walker River in the State of California, and said Rickey Land and Cattle Company, petitioner herein, plaintiff in said action commenced in Mono County, prayed that said Superior Court in Mono County, State of California, should adjudge that the said Rickey Land and Cattle Company, petitioner herein, complainant in said action, is the owner of, and in the possession of, and in the use and enjoyment of, and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of said West Fork of said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second for use on its land riparian to said West Fork of the Walker River in the State of California; and it was further prayed in the said complaint in said Superior Court of Mono County that said court further adjudge that neither of the defendants in said action in Mono County, including said Miller & Lux, has any right, title, interest, claim or estate in or to any of the waters, or to the use thereof, flowing, or which may hereafter flow, in said West Fork of the Walker River in the State of California, when the quantity of

water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and it was further prayed in said complaint that the said Superior Court in Mono County further adjudge that each of the said defendants, including Miller & Lux, are estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors or assigns, any right, title, claim, interest or estate, in or to any of the waters, or to the use thereof, now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second.

VII.

That on the 15th day of October, 1905, the said Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court of Mono County, State of California, against one hundred and fifty-one (151) defendants, including Miller & Lux, the complainant in said action commenced in the United States Circuit Court for the District of Nevada, on the 10th day of June, 1902.

That said action was commenced in Mono County by the filing of a complaint by said Rickey Land and Cattle Company in said Superior Court of Mono County, in which said complaint said Rickey Land and Cattle Company alleged that the Rickey

Land and Cattle Company had been since the 6th day of August, 1902, the owner of, and in possession of, and entitled to the possession of certain lands in the State of California, which said lands were the lands so conveyed by said Thomas B. Rickey to said Rickey Land and Cattle Company; and in said complaint it was further alleged that the said lands constituted one entire, continuous body of land, over, through and upon which said East Fork of the Walker River flows, and from time immemorial has flowed, and that said lands, and all thereof, are, and from time immemorial have been, riparian to said East Fork of the Walker River, situate along and bordering upon said East Fork of the Walker River.

It was further alleged in said complaint filed in said Mono County, State of California, that said Rickey Land and Cattle Company, petitioner herein, is the owner of and in possession of and entitled to the possession, use and enjoyment of, and has the right to divert, use and appropriate all the waters of said East Fork of the Walker River and its tributaries in the State of California to the extent of the constant flow of five hundred and four (504) cubic feet of water per second, for use upon said lands in the State of California, riparian to said East Fork of the Walker River; and it was further alleged that each of said one hundred and fifty-one (151) defendants in said action, including said defendant Miller & Lux therein, claims some right, title and interest

adverse to the Rickey Land and Cattle Company, complainant in said action in Mono County, in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof in the East Fork of the Walker River in the State of California.

And it was further alleged in said complaint in Mono County that said right, title and interest in and to said water so claimed and asserted by each of said defendants, including said Miller & Lux, to the waters of said East Fork of the Walker River are subordinate and subject to the said alleged ownership of said Rickey Land and Cattle Company, and its right to divert and appropriate from said East Fork of said Walker River in the State of California a constant flow of five hundred and four (504) cubic feet of water per second for use upon its lands.

And it was further prayed in said complaint in said Superior Court of Mono County that said court further adjudge that neither of the defendants in said action in Mono County, including said Miller & Lux, has any right, title, interest, claim or estate, in or to any of the waters, or to the use thereof, flowing, or which may hereafter flow, in said East Fork of the Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second.

And it was further prayed in said complaint in

Mono County that the said Superior Court of Mono County further adjudge that each of said defendants, including said Miller & Lux, are estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors or assigns, any right, title, claim, interest or estate in or to any of the waters, or the use thereof, now flowing, or which may hereafter flow, in said East Fork of said Walker River, in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second.

That after the said actions were commenced in Mono County, State of California, as aforesaid, said Miller & Lux commenced this action in the Circuit Court of the United States for the District of Nevada, as an ancillary action to the original action of *Miller & Lux vs. Thomas B. Rickey et al.*, to restrain the Rickey Land and Cattle Company, petitioner, from prosecuting the two actions aforesaid commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, and said Miller & Lux in said last-named ancillary action alleged that the necessary effect of said actions so commenced in Mono County was to bring on for trial and determination, in said Superior Court of the State of California, the same issues presented by the said bill of complaint of said Miller & Lux in said suit so brought by it originally in the United States Circuit Court for the District of Ne-

vada, so far as relates to the issues made between said Miller & Lux and said Thomas B. Rickey, and to obtain from said Superior Court of the State of California a judgment determining said issues in advance of the determination of the same by the United States Circuit Court for the District of Nevada, and thereby to defeat the jurisdiction of the United States Circuit Court for the District of Nevada in the said suit of *Miller & Lux vs. Thomas B. Rickey et al.*, so pending before said court, and to hinder and embarrass the said United States Circuit Court for the District of Nevada in the trial of said issues, and in the enforcement of any decree which said United States Circuit Court for the District of Nevada may render in said suit of *Miller & Lux vs. Thomas B. Rickey et al.*, so pending before it.

And it was further alleged in complainant's ancillary bill of complaint herein that the further prosecution of said actions, or either of them, brought by the Rickey Land and Cattle Company, petitioner herein, would be in derogation of the jurisdiction of the United States Circuit Court for the District of Nevada, and the rights of Miller & Lux in the suit so brought by said Miller & Lux in said United States Circuit Court for the District of Nevada and then pending therein; and in said ancillary suit it was prayed that said Rickey Land and Cattle Company, petitioner herein, its agents, servants and attorneys, and all persons acting under or in aid of them,

or either of them, be enjoined and restrained from further prosecution as against Miller & Lux either of the said actions so brought by petitioner in said Superior Court of the County of Mono, State of California, and from taking any further step whatever in either of said actions commenced in Mono County as against Miller & Lux.

VIII.

In pursuance of the prayer of said Miller & Lux in said ancillary action, the United States Circuit Court for the District of Nevada made its order that the said defendant Rickey Land and Cattle Company, a corporation, show cause before said court why an injunction should not issue pending said suit according to the prayer of the complaint in said ancillary action.

That in pursuance of said order to show cause said Rickey Land and Cattle Company filed affidavits in said ancillary action in answer to said order to show cause, and the hearing was thereon had before said Circuit Court of the United States for the District of Nevada on the 25th day of June, 1906, and an interlocutory decree was made by said court. That by said interlocutory decree it was ordered, adjudged and decreed that said defendant Rickey Land and Cattle Company, its agents, servants and attorneys, and all persons acting in aid of them, or any of them, be enjoined and restrained from further prosecuting

as against said Miller & Lux either of the two actions commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, and from taking any further step whatsoever in either of said actions as against said Miller & Lux, pending the final hearing and determination of the said ancillary suit and until the further order of the said Circuit Court of the United States for the District of Nevada in said ancillary suit.

IX.

That after said decree in said ancillary action was rendered in due and proper season an appeal was prosecuted by the Rickey Land and Cattle Company from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and all necessary and proper steps were taken for the prosecution of said appeal and the hearing of the same. That in due and proper season said appeal came on to be heard before said Circuit Court of Appeals for the Ninth Circuit, and after the hearing thereof, to wit, on the 4th day of March, 1907, the said interlocutory decree appealed from was affirmed by said Circuit Court of Appeals, and a decree to that effect was thereupon entered.

After the entry of said decree by said Circuit Court of Appeals, the Rickey Land and Cattle Company, in due time, filed with said Circuit Court of Appeals

a petition for a rehearing of the aforesaid appeal, which said petition for rehearing was, on the 20th day of May, 1907, denied by said Circuit Court of Appeals.

X.

That a true and correct transcript of the record on appeal in said case, together with a copy of the decree of the said Circuit Court of Appeals affirming the decree appealed from, and also a copy of the opinion of said Circuit Court of Appeals rendered thereon are herewith produced and filed in this court.

XI.

We respectfully submit that the Circuit Court of Appeals was in error in affirming the decree of the United States Circuit Court for the District of Nevada, for the following reasons:

1. The prosecution of the actions in Mono County, State of California, enjoined by the order and decree appealed from, would not, in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States for the District of Nevada, in the case of *Miller & Lux vs. Thomas B. Rickey and others* pending in the said Circuit Court at the time of the commencement of said action in Mono County.
2. That the issues to be tried in the said suits in Mono County, State of California, were not the same

issues as were to be, or could be, tried in the said case of *Miller & Lux vs. Thomas B. Rickey and others* pending in the United States Circuit Court, Ninth Circuit, District of Nevada.

3. That the subject matter of the suits in Mono County, State of California, was not in any part the same subject matter as was that of the case of *Miller & Lux vs. Thomas B. Rickey and others*, pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada.

4. That the Rickey Land and Cattle Company is not a party to the said action of *Miller & Lux vs. Thomas B. Rickey and others* in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and would not be bound in any manner by any judgment or decree rendered in that court.

5. That any judgment rendered in the said action of *Miller & Lux vs. Thomas B. Rickey and others*, pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, would not affect, quiet or determine the title of the Rickey Land and Cattle Company to the waters, or the use of the waters of the Walker River in the State of California, and the Court should not therefore have enjoined and restrained the Rickey Land and Cattle Company from prosecuting the said actions in Mono County, State of California, to quiet the title of said Rickey Land and Cattle Company to the said waters of Walker River in the State of California.

6. That the said Rickey Land and Cattle Company was not a party complainant or defendant in the said action of *Miller & Lux vs. Thomas B. Rickey et al.*, pending in the Circuit Court of the United States, Ninth Circuit, District of Nevada, and therefore the said Rickey Land and Cattle Company should not have been restrained from prosecuting said actions in the Superior Court of Mono County, State of California.

7. That the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try and determine the rights to the use of the waters of the Walker River in the State of California, nor the title of Thomas B. Rickey to the waters of the Walker River in the State of California, nor the right to the use of the water by the Rickey Land and Cattle Company in the State of California, in said action of *Miller & Lux vs. Thomas B. Rickey and others*, and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of Thomas B. Rickey to the use of said waters, and the right to the use of said waters, because said water was in the State of California, and the use of said water and the diversion of said water was made by said Thomas B. Rickey and by the Rickey Land and Cattle Company, his successor, in the State of California, and the water and the land upon which the use of the water was made was all in the State of California,

and not in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California, or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River in the State of California, as the successor of Thomas B. Rickey.

XII.

The questions in this appeal involved are of great public importance and concern. In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. Streams from which the water is received, in many instances, have their sources in one State, and in the course of the stream it flows through one State into and through another State. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams flow in or through more than one State and furnish water used for irrigation. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent

upon the waters of these canals. The prosperity of the entire Western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flows, it is important that this Court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the Court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the Court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the

Court occupied by what may ultimately prove to be a purposeless trial.

XIII.

That the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals affirming the decree of the Circuit Court of the United States, Ninth Circuit, District of Nevada, is erroneous, and that this Honorable Court should require the said case to be

certified to it for its review and determination in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding the said court to certify and serve to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled the *Rickey Land and Cattle Company, a corporation, Appellant, vs. Miller & Lux, a corporation, Appellee, No. 1366*, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the Act of Congress entitled An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891.

That your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part

thereof may be reversed by this Honorable Court.
And your petitioner will ever pray.

THE RICKEY LAND AND CATTLE COMPANY.

By Thomas R. Rickey, President.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

State of California,
City and County of San Francisco—ss.

Charles C. Boynton, being
duly sworn, says that he is one of the counsel for the
Rickey Land and Cattle Company, a corporation,
petitioner, that he prepared the foregoing petition,
and that the allegations thereof are true as he verily
believes.

Charles C. Boynton
Subscribed and sworn to before me this 17th
day of February, 1908.

My commission expires on the 12th day of
February, 1909.

Flora Hall (seal)
Notary Public in and for the City and County of
San Francisco, State of California.

Nevada

City of Ormely State of California,
~~City and County of San Francisco—ss.~~

Thomas B. Rickey, being duly sworn, states that he is the President of the above-named petitioner, the Rickey Land and Cattle Company, and as such President has full knowledge of its business affairs, and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above-entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Thomas B. Rickey

Subscribed and sworn to before me this _____
 day of *October*, 1907.

C. H. Peters

Notary Public in and for the City and County of *Orm*
 San Francisco, State of California. *Nevada*

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petitioner should be granted by this Honorable Court.

Chas C Baynton

Of Counsel for said Rickey Land and Cattle Company, Petitioner.

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FILED.

MAR 2 1908

JAMES H. McKENNEY

CLERK

No. ~~640~~

IN THE
Supreme Court of the United States

OCTOBER TERM

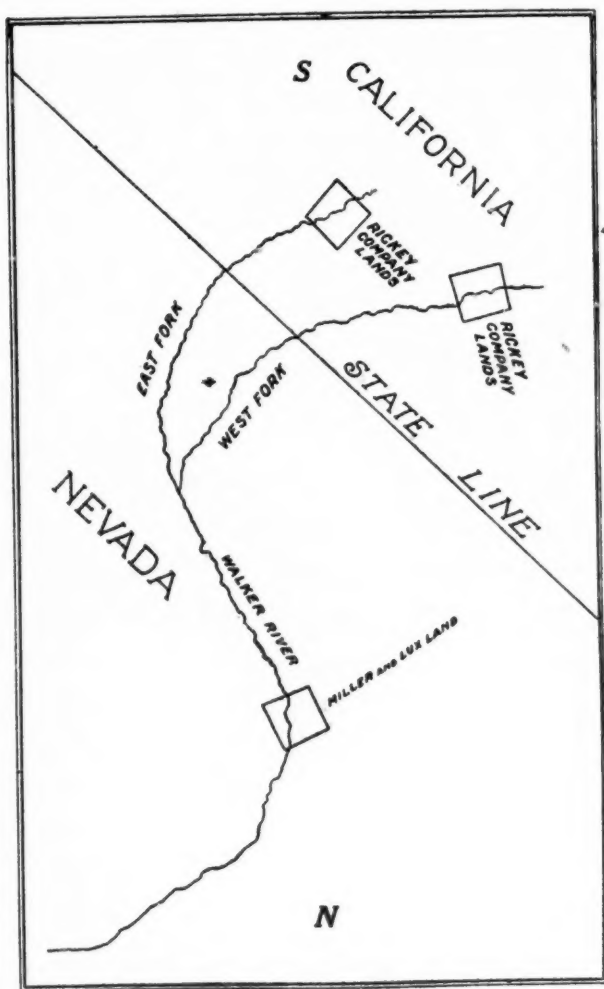
RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

MILLER & LUX (a Corporation),
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

F. D. MCKENNEY,
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.



IN THE
Supreme Court of the United States

OCTOBER TERM

RICKEY LAND AND CATTLE

COMPANY, a Corporation,

Petitioner,

vs.

MILLER & LUX, a Corporation,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

This petition is prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for the district of Nevada, enjoining petitioner from prosecuting two actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the prosecution of said actions would be to bring on for trial and determination the same issues as theretofore had been presented by a certain action brought by respondent in the United States Circuit Court for the district of Nevada, and

thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the Plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California to irrigate its said lands.

Respondent owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in the State of Nevada to irrigate said lands.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the district of Nevada against one Thomas B. Rickey and 137 other defendants, and alleged that it was the owner, by appropriation, of certain rights in the

waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of waters to which it was entitled (Trans., pp. 3 and 4).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the district of Nevada, setting up the facts that the Walker River rises in the State of California and flows therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irrigation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker River in the State of Nevada (Trans., p. 3).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the district of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 4).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 8-11).

Thereafter said Miller & Lux, respondent, brought this action in the United States Circuit Court for the district of Nevada to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the two last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were presented by the bill of complaint in the said original action of *Miller & Lux vs. T. B. Rickey*, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court in the original action, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada (Trans., pp. 15, 16). An interlocutory order and decree restraining appellant herein from prosecuting said actions in the California court was thereafter entered (Trans., p. 64), and from such order and

decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed.

This writ is prayed for in order to have said decree reviewed by this honorable court.

PUBLIC IMPORTANCE OF QUESTIONS INVOLVED.

Preliminary to the discussion of the grounds wherein we contend that the Court of Appeals erred in making its decree herein, we submit the following brief statement of the great public importance and concern of the questions involved in this appeal.

In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams have their source in one State and in their course flow through that State into and through another State, and furnish water used for irrigation in both States along their course. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent upon the waters of these streams and canals. The prosperity of the entire

western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States Courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flow, it is important that this court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the court occupied by what may ultimately prove to be a purposeless trial.

We further submit that the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

In this case the question of the sovereignty of a State over the realty within its boundary is directly involved. If the courts of one State have jurisdiction to adjudicate directly as to and bind the titles to real property in another State, there is nothing left to the sovereignty of the latter State except a shell. A State acting within constitutional limitations is supposed to be absolute in the enactment and enforcement of laws governing the title to real property situate within

that State. But if foreign courts, in no way responsible to the people of a State, have power to adjudicate directly as to and bind titles to realty in the State, none of the attributes of sovereignty remain except the name. That is one of the vital questions that form the basis of this appeal.

There is a single question involved in this appeal. *It is as to the jurisdiction of the United States Circuit Court for the district of Nevada, in a local action, over water rights IN THE CALIFORNIA PORTION OF A STREAM, which stream rises in and flows through and out of the State of California into and through the State and district of Nevada.*

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were theretofore presented by the action commenced by respondent in the United States Circuit Court of Nevada (Trans., pp. 15, 16).

We desire to argue a single proposition, viz., THAT THE ACTIONS COMMENCED BY PETITIONER IN CALIFORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE ACTION COMMENCED BY RESPONDENT IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS, or vice versa.

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court must necessarily be situate exclusively within the State of Nevada, and thus the only issues presented by said action are as to respondent's title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California can not be the same issues as are presented in the Nevada actions, which are as to the title to a different realty, situate in Nevada.

Both the actions commenced by respondent in the State of Nevada and the two actions commenced by petitioner in the State of California, were actions to establish and quiet title to real property and were local actions, and each action was local to the State wherein it was brought. This doctrine, with which we fully agree, was announced by the Court of Ap-

peals in this case, (see *Rickey Land and Cattle Company vs. Miller & Lux*, 152 Fed., 11,) and is supported by the authorities cited in the opinion, as well as by the leading case of *Northern Indiana R. R. vs. Michigan Central R. R. Co.*, 15 How., 233, and by the following authorities as well:

- Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, 83; No. 13446;
Morris vs. Remington, 1 Parsons (Penn.), 387;
Gould on Waters, 3d. Ed., par. 445;
Bumps on Fed. Prac., p. 138;
Angel on Watercourses, 7th Ed., par. 418;
Enc. of Pleading and Practice, Vol. 22, p. 1158;
Bouvier's Law Dictionary, p. 66, par. 9;
Gould on Pleading, p. 114;
The Company of the Mersey vs. Irawell Mfg. Co., 2 East, 498;
United States vs. Rio Grande Dam, etc., Co., 174 U. S., 690;
Bates' Fed. Eq. Pro., par. 71;
United States vs. Winans, 73 Fed., 72;
Pomery Eq. Jrsp., Sec. 298;
Mississippi & Mo. R. R. Co. vs. Ward, 67 U. S., 485.

It is universally held that the jurisdiction of a court in a local action is confined to a subject matter

situate within the territorial limits of the court's jurisdiction.

- Northern Indiana R. R. Co. vs. Mich. Central R. R. Co.*, 15 Howard, 233;
Livingston vs. Jefferson, 1 Brock, 203, Fed. Case No. 8411;
McKenna vs. Fiske, 1 Howard, 241;
Massey vs. Watts, 6 Cranch, 148;
Conant vs. Deep Creek Irrigation Co., 23 Utah, 627, 66 Pac., 188;
Davis vs. Headley, 22 New Jersey Equity, 115;
Carpenter vs. Strange, 141 U. S., 105;
Guaranty Trust Co. vs. Delta Co., 104 Fed., 5;
Story on Conflict of Laws, 7th Ed., Sec. 5433, p. 685;
Watts vs. Waddle, 6 Peters, 389;
Watkins vs. Lessee, 16 Peters, 25;
Corbett vs. Nutt, 10 Wallace, 457;
Boyce vs. Grundy, 9 Peters, 275;
Baltimore Association vs. Alderson, 90 Fed., 142;
Farmers' Loan & Trust Co. vs. Northern Pacific Railroad, 69 Fed., 871;
Bates' Fed. Equity Procedure, Secs. 70-75;
Texas & Pacific Railroad Co. vs. Gray, 86 Texas, 571;
Pine vs. New York, 185 U. S., 93;
People vs. Central R. R. Co., 42 N. Y., 283.

The distinction between local and transitory actions exists as much in determining the jurisdiction of courts of equity in equitable proceedings as it does in courts of law in legal proceedings. This doctrine was also announced by the Court of Appeals in this case. See *Rickey Land and Cattle Company vs. Miller & Lux*, 152 Fed., p. 11.

See also,

- Wharton, Conflict of Laws*, 2d ed., 282, 288;
- Lewin on Trusts*, vol. I, p. 129, star pages 48-49;
- Morris vs. Chambers*, 29 Beaver, 246, same, 3 De G. and F., 583;
- Dicy on Conflict of Laws*, p. 214;
- Harris vs. Harrison Law Rep.*, 8 Chancery Appeals, 342;
- Jenkins vs. Lester*, 131 Mass., 355;
- Bates on Fed. Equity Pro.*, Vol. 1, Sec. 75;
- Huntington vs. Atrol*, 146 U. S., 656;
- Greeley vs. Low*, 155 U. S., 58, 76;
- Northern Indiana Railroad Co. vs. Mich. Central Railroad Co.*, 15 Howard, 233;
- Miss. & Missouri Railroad Co. vs. Ward*, 67 U. S., 485;
- Pomeroy, Equity Jurisprudence*, 2d ed., Vol. 1, Sec. 298 and Sec. 1318;
- Story's Conflict of Laws*, 7th ed., Sec. 534, p. 685;

- Stillman vs. White Rock Manufacturing Co.*,
Fed. Cases, No. 13,446;
Morris vs. Remington, select equity cases,
Parsons, 387;
Gould on Waters, Sec. 446;
Atlantic Dredging Co. vs. Bergenecck Railroad
Co., 44 Fed., 208;
Story, Equity Jurisprudence, 12th ed., Sec.
774;
People vs. Colorado Railroad Co., 42 Fed.,
638;
Atlantic & Tel. Co., 46 New York Sup. Ct.,
377;
Western Union Telegraph Co. vs. Western
Railroad Co., 8 Baxter, Tennessee, 54;
Marshall vs. Turnbull, 34 Fed., 827;
Western Union Telegraph Co. vs. Pacific &
Atlantic, 49 Illinois, p. 90;
Fargo vs. Redfield, 22 Fed., 373-375;
Port Royal Railroad Co. vs. Hammond, 58
Georgia, 523;
Montgomery vs. Commercial Bank, 1 S. and
M. and Ch., 632;
Northfork Railroad Co. vs. Postal Telegraph
Co., 88 Virginia, 396;
Linsey vs. Silver Star Mining Co., 66 Pac.,
382;
Texas & Pac. Railroad Co. vs. Gay, 86 Texas,
p. 571;

- Guarantee Trust Co. vs. Deta & P. L. Co.*, 104 Fed., 5;
Baltimore B. N. L. Ass'n vs. Alderson, 90 Fed., 142;
Carpenter vs. Strange, 141 U. S., 87;
Farmers' Loan Trust Co. vs. No. Pac. Railroad Co., 69 Fed., 871;
Washburn Easements, 3d ed., 692;
Smith's Leading Cases, p. 1064;
Encyclopedia of Pleading and Practice, Vol. 14, pp. 1122, 1125-1126, 1106;
Gould on Waters, 3d ed., Sec. 444;
Angel on Watercourses, 7th ed., Sec. 418;
Johnson vs. Superior Court, 65 Cal., 567;
Gilbert vs. Water Power Co., 19 Iowa, 319;
People vs. Central Railroad Co. of N. J., 42 N. Y., 283;
Wood on Nuisances, 3d ed., Sec. 830;
Gilbert vs. Water & Power Co., 19 Iowa, 319;
Elred vs. Ford, 36 Wis., 530;
Horn vs. City of Buffalo, 49 Hun., 76;
Buck vs. Ellenbolt, 84 Iowa, 394.

These actions being to quiet title to real property, and the issues presented thereby being as to the title to the realty that constitutes the subject matter of the respective actions, in order to sustain the decree herein which is based on the finding that the same issues were presented by the California actions as

were theretofore presented by the Nevada action, IT MUST APPEAR THAT THESE RESPECTIVE ACTIONS HAD SOME COMMON SUBJECT MATTER OVER WHICH THE NEVADA COURT AND THE CALIFORNIA COURT HAD CONCURRENT JURISDICTION.

From the very nature of local actions and the limitations on the jurisdiction of these respective courts created by the Constitution and the laws of Congress set out and referred to in the foregoing authorities, it is a manifest impossibility for there to be a common subject matter, real property, over which in local actions courts, either State or Federal, sitting in different States, can have concurrent jurisdiction.

The only statute that we have been able to find that extends the jurisdiction of a Federal court in a local action so that it may in any case include a subject matter outside of its district, is contained in Sec. 742, Rev. Sts., which reads as follows:

"Any suit of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in the Circuit or District Court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause *mesne* or final process to be issued and executed as fully as if the said subject matter were wholly within the district for which such court is constituted."

In no instance has the jurisdiction of courts, either State or Federal, been extended so that courts sitting in different States could have concurrent jurisdiction in a local action over a common subject matter situated either wholly in one State or wholly in the other State, or partly in one State and partly in the other.

Therefore, these actions being local actions to quiet the title to real property, it is inherently impossible that the same issues be presented in the actions brought by petitioner in California as were presented in the action brought by respondent in Nevada.

This petition might be submitted on the foregoing statement of these broad general principles on which all courts are in accord. But in view of the importance of the interests herein involved, and of the wide-reaching public importance of a decision finally determining the limits of the jurisdiction of the Federal Courts in actions involving water rights in interstate streams, we will respectfully submit the propositions herein set forth to a more minute and careful analysis.

In the discussion which will immediately follow, it will be assumed that the rights of both parties to the water of the stream stand on a parity. That is to say that both base their rights to the water upon appropriation. This is not, however, the case. The laws of the State of California confer rights upon the owners of riparian lands to use the water, and

the right is not determined by priority of use, as are the rights between appropriators. In fact, the right to use water by riparian owners in California is not dependent upon actual use. *Lux vs. Haggin*, 69 Cal., 255, while in Nevada the law is entirely of appropriation.

When, therefore, in the discussion, we place the rights of both parties upon the basis of appropriation, we are in a measure surrendering the advantage of position. In reviewing the decision of the Court of Appeals, we will call attention to this difference in the laws of the two States.

Putting aside for the time any consideration of the effect of rules limiting the jurisdiction of courts, what, in the broadest sense, are the property rights described by the facts set out in the bills of complaint filed in the courts of Nevada and California, respectively?

Briefly, respondent, in its original bill filed in the United States Circuit Court of Nevada, states facts showing the ownership of a right to divert and use for irrigation, certain water of the Walker River in Lyon County, Nevada (Trans., pp. 4-5). The primary elements of such a water right in a natural stream are:

First, the right to have the water flow, unimpaired in quality or quantity, from its source, down the stream to the point of diversion.

Second, of the right to divert the water from the stream when it reaches his point of diversion.

Cole vs. Richards (Utah), 75 Pac., 376;
Black's Pomeroy on Water Rights, par. 64;
Farnham on Waters & Water Rights, p. 3,
 Sec. 674;
Phoenix Water Co. vs. Fletcher, 23 Cal., 482.

The right of the appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet it is a substantial right and interest in the stream itself which courts will protect.

Black's Pomeroy on Water Rights, Sec. 64;
Duckworth vs. Watsonville W. & L. Co.
 (Cal.), 89 Pac., 338;
Cole vs. Richards (Utah), 75 Pac., 376.

in which case the Court said:

"It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, *the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained*, and any interference with the

stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

Taken most broadly and construed most liberally in its favor, respondent's rights, acquired by its appropriations from this stream in Nevada, consist:

First, of the right to have the water of the Walker River flow, to the extent of respondent's appropriation, unimpaired in quantity or quality, from its source in the State of California, down through the State of California toward respondent's point of diversion as far as the California State line.

Second, of the right to have the water of the Walker River to the extent of respondent's appropriation, flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondent's point of diversion.

Third, of the right to divert the water when it reaches the point of diversion.

That the courts of California will protect respondent's right to have the water of the Walker River flow from its source, down through the State of California toward its point of diversion as far as the Nevada line, has been held in

Howell vs. Johnson, 89 Fed., 559;

Morris vs. Bean, 123 Fed., 618;

Hoag vs. Eaton, 135 Fed., 411;

Anderson vs. Bassman, 140 Fed., 14-20.

That the courts of the State of California have no jurisdiction to protect, determine, or affect respondent's right to have the water of Walker River flow from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to its point of diversion, or respondent's right to divert the water when it reaches its point of diversion in Nevada, is unanswerably announced in

Conant vs. Deep Creek Irrigation Co., 23

Utah, 627, 66 Pac., 188;

Lamson vs. Vailes, 27 Colo., 201, 61 Pac., 231.

These authorities hold that to be the exclusive function of the courts of the State of Nevada.

Likewise, we submit, the courts of Nevada, State or Federal, have no jurisdiction to protect, determine, or affect respondent's right to have the water of Walker River flow from its source in the State of California down through the State of California. That is the exclusive function of the courts of the State of California. The courts of California possess, and will exercise that function.

Howell vs. Johnson, *supra*;

Morris vs. Bean, *supra*;

Hoag vs. Eaton, *supra*;

Anderson vs. Bassman, *supra*.

That the courts of Nevada do not possess, and can not exercise the function of determining and protecting rights in the California portion of the stream, we submit as the pivotal point in this case.

Turning to the rights of petitioner involved, as the subject matter in the actions brought by petitioner in the Superior Court of California, as described in the complaints, they consist of a water right in the Walker River in the State of California (Trans., pp. 8-13). This right, as we have seen in its elemental parts, consists:

First: Of the right to have the waters of the stream flow from its source down through the State of California unimpaired in quantity or quality to petitioner's point of diversion in the State of California.

Second: Of the right to divert the water at that point.

This is a right the Superior Court of California can protect, and an action to quiet title to this right was properly brought in said Superior Court. But it is obviously manifest that petitioner could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to this water right in the State of California. A judgment of a Nevada court quieting title to real property in the State of California would be a mere nullity. Yet complainants, in the original action, are

simply turning the other side of the shield to the front and bringing an action in the State of Nevada in an attempt to quiet their title to a water right they claim in the stream in the State of California because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondent, by virtue of its appropriation in Nevada, happens to have a right in this stream in the State of Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change his point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to his right to have the water flow down the stream in California, a right to have the water flow down the stream and be diverted in the State of Nevada, but by so doing, petitioner could not vest the Nevada court with jurisdiction over his right to have the water flow down the stream in California. It is true that, after he changed his point of diversion down the stream into the State of Nevada, the Nevada court could protect his right to have the water flow down the stream in the State of Nevada, but the Nevada court would have no more jurisdiction to protect his right to have the water flow down the stream in the State of California after he changed his point of diversion into the State of Nevada, than when the point of diversion was in the State of Cali-

foria. The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream is exclusively within the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream is exclusively within the jurisdiction of the Nevada court.

Respondent's main argument in support of the jurisdiction of the United States Circuit Court for the State of Nevada was, that a stream is, by its very nature, an *indivisible res*. Being indivisible, if a part of it is within the jurisdiction of a court, the whole of it is within the jurisdiction of that court. Thus, as the lower portion of this stream flows through the jurisdiction of the United States Circuit Court for the district of Nevada, that court has jurisdiction to adjudicate the rights in the whole stream. Likewise, it can be argued that, as a portion of the stream flowed through the State of California, the stream being an *indivisible res*, the courts of the State of California have jurisdiction to adjudicate rights in the entire stream. In other words, the argument is to the effect that this stream is a subject matter over which the courts of these respective States have each complete and concurrent jurisdiction. As before observed, this argument of the *indivisible res* would empower the California court to adjudicate as to the

rights to have the water flow exclusively through and be diverted from the Nevada portion of the stream, and would empower the Nevada court to adjudicate the right to have the water flow exclusively through, and be diverted from the California portion of the stream. The fact that the water flows from the State of California into the State of Nevada could not render the jurisdiction of the California court over the Nevada portion of the stream any different from the jurisdiction of the Nevada court over rights in the California portion of the stream, if the stream is an *indivisible res*. If the stream is an *indivisible res*, it can not be divisible when you look down the stream, and indivisible when you look up the stream.

As above noted, there is no authority in law giving courts of different States concurrent jurisdiction over the same subject matter in a local action. There is nothing any more indivisible about a stream, then there is about a piece of land, or a wagonroad or a railroad lying partially in two States. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagonroad or a railroad contemplate a movement in both directions along the way, but this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or vice versa, if an *indivisible res*, would be both wholly in the United States and wholly in British Columbia. But

this question of the indivisible nature of a stream and the concurrent jurisdiction of courts of different States thereover, is not an open question. It came before this court in the case of the *Miss. & Mo. R. R. Co. vs. Ward*, 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River, and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi River, and thus one-half of the stream and one-half of the bridge only were within the territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But the Supreme Court of the United States did not view either the

bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream, and held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and thus determined that the court could neither inquire into, nor adjudicate, concerning rights in the stream or the effect of the bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

"This is a question that we can not examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi River by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an Act of Congress."

Again, Mr. Justice Nelson, while dissenting from

the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

“The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side.”

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a

bridge, and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that, this action being one to abate a nuisance, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

The Court of Appeals lays stress on the fact that respondent's water right is *an easement* appurtenant to certain lands "REALTY" which lie in Nevada, and, speaking of the right or easement, says, "IT SAVORS OF, AND IS PART OF, THE REALTY ITSELF," and thus the suit is "*one concerning or pertaining to that realty*," from which the deduction is made that, the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception simply is that an easement must, of

necessity, have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous, seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement to which they are appurtenant. As was said by way of illustration by Justice Woodbury in the leading case of *Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, p. 83, in speaking of a water right in an interstate stream:

"Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in another for the injury committed there."

See also,

Bannigan vs. City of Worcester, 30 Fed., 394.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court simply because it hap-

pened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell vs. Johnson, supra;

Morris vs. Bean, supra;

Hoag vs. Eaton, supra;

Anderson vs. Bassman, supra.

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which rights were appurtenant to lands in the lower State. If the water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject matter within the jurisdiction of the court.

But, even conceding this manifestly erroneous doctrine to be correct, conceding that respondent's land being located in Nevada has the effect of causing respondent's rights in this stream which are appurtenant to this land to be drawn down and located in Nevada, then there is nothing left within the jurisdiction of the California court to make a conflict. The California court simply has no jurisdiction over the subject matter, and its judgment would be a nullity and a vain act. Courts of equity will not interfere to restrain the doing of a vain act.

It is true that the subject matters of these actions

in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California, but that dependency does not make them one and the same. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California may diminish respondent's right in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondent's rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondent's rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream as an easement right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondent's right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondent must have protection, irrespective of whether it

desires to divert the water from the California or the Nevada portion of the stream. If respondent can protect its rights in the stream in California, then it may receive the amount of water it is entitled to and desires to divert in the State of Nevada at the State line dividing the two States. Respondent's rights directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondent may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondent, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California, then, beyond question, its rights in the stream are in the State of California and beyond the jurisdiction of the Nevada court. *Conant vs. Deep Creek Irrigation Co., supra.*

Then let respondent change its point of diversion and use down the stream onto lands in the State of Nevada. By so doing, has it lost its rights in the stream in the State of California? Or has it not the very same rights in the stream in the State of California that it had before it changed its place of use? We respectfully submit it has. It has lost no rights in the stream in the State of California by changing its point of diversion and use to a point lower down on the stream and in the State of Ne-

vada, and it can at any time change its point of diversion and use back up the stream and into the State of California.

Hargrave vs. Cook, 108 Cal., 80;

Kidd vs. Laird, 15 Cal., 180;

Davis vs. Gale, 32 Cal., 26.

By changing his point of diversion and use from the State of California to a place lower down on the stream and in the State of Nevada, respondent may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that it did not have when it diverted all the water it was entitled to in the State of California; but the acquisition of such new rights to have the water flow down the stream in the State of Nevada that would result from the changing of its point of diversion and use from a place up the stream and in the State of California to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there just as much as they ever were, and any action having as its subject matter rights in the stream in California might affect these rights, but the rights affected would be just as much in the State of California in the case supposed after the point of diversion and place of use had

been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into the courts of Nevada, which are the only courts having jurisdiction thereof.

Just as the courts of California can not protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in

Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of *Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

"Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on

the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses*, p. 11, Sec. 3, and cases there cited; *Webb vs. Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259.

The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Cook, 62.

"The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the center of the river, or no interests to be protected there." (Italics ours.)

See also *Bannigan vs. City of Worcester*, 30 Fed., 394.

THIS COURT CAN NOT AFFIRM THE DECREE HEREIN, WHICH WAS AWARDED ON THE NECESSARY GROUND THAT THE SUBJECT MATTER OF THE ACTION COMMENCED BY PETITIONER IN THE STATE OF CALIFORNIA IS THE SAME AS THE SUBJECT MATTER OF THE ORIG-

INAL BILL FILED BY RESPONDENT IN THE STATE OF NEVADA WITHOUT RULING DIRECTLY IN CONFLICT WITH THE DECISIONS ANNOUNCED IN THE ABOVE-CITED CASES OF

Howell vs. Johnson, 89 Fed., 559;

Morris vs. Bean, 123 Fed., 618;

Hoag vs. Eaton, 135 Fed., 411;

Anderson vs. Bassman, 140 Fed., 14-20.

These cases all hold that the right of respondent to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the subject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State, in the courts of the upper State. These actions were presented on bills of complaint of precisely the same nature as the original bill of complaint in the case of *Miller & Lux vs. T. B. Rickey et al.*, which the Court of Appeals, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But, we submit, that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by appellant herein in Mono county, California, to quiet its title to the waters of the Walker river, in the State of California.

Supposing that respondent herein had gone into the United States Circuit Court for the Northern District of California and commenced an action against appellant herein to enjoin appellant from diverting the water of the Walker river, in the State of California, and set up its rights and appropriations in said Walker river, where would have been the subject matter of that action? Clearly, it would have been exclusively in the State of California. Should respondent prevail, the said court of California would have jurisdiction to protect its rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect respondent's rights in the stream would stop at the State line. It could deliver the water at the State line but no further. Petitioner herein might, if such a decree was rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above respondent's point of use in the State of Nevada, and the decree in the court of the State of California could in no wise determine the rights in

the stream in the State of Nevada or protect respondent's rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, respondent would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by petitioner in the State of California are in the State of California. If these same rights and this same subject matter are within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above-cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. These were the rights of respondent that were involved in the

action commenced by petitioner in Mono county, California, and none of those rights are involved in the action pending in the State of Nevada. Thus, the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions, Miller & Lux would establish and protect its entire rights in the stream in California, as well as in Nevada, but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise, by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO THIS COURT MUST HOLD THAT THE SUBJECT MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against T. B. Rickey. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending. (Black on Jdmts., §550; Freeman on Jdmts, §§ 196-7.) For the doctrine of *lis pendens* to apply, the *res* must be within the territorial jurisdiction of the court.

Carl vs. Lewis Coal Co., 96 Mo., 149;
Sheldon vs. Johnson, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate wholly in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the bill filed by respondent

in that action, yet the *res* transferred was the subject matter of the action in the Mono county suits, and thus it follows that there is no room for the application of the doctrine of *lis pendens* by which it is sought to connect petitioner herein with the original action of *Miller & Lux vs. Rickey et al.*

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream, and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the

stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co. vs. Miller & Lux*, 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal hereditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land (*Jacobs vs. Lorenze*, 96 Cal., 340). The easement in the water may be transferred from a present owner to another,

and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court, therefore, made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux attached to the entire stream above the ditches of Miller & Lux. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada petitioner disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to realty," and that the right to water was to be treated as real estate, and further that the court of

Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono county case in California was unequivocally real estate in the State of California. The Court concluded that the Nevada court had no jurisdiction to quiet the title to this land. How, then, did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of the Court supporting the jurisdiction is as follows, see page 17 (transcript, p. 19):

"The appellant's counsel maintain that, because the appellant has set up in its answer and cross bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the

power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

“That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion

and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. *Howell vs. Johnson*, 89 Fed., 556; *Hoge vs. Eaton*, 135 Fed., 411; *Anderson vs. Bassman*, 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson vs. Bassman*, *supra*. 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in de-

termining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson river, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.' ”

As the whole decision rests upon this part of the opinion, we desire to follow this reasoning sentence by sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

“The appellant’s counsel maintained that because the appellant has set up in its answer and cross-bill to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada.”

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono county as standing in the same relation to the original case, as would such

facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be practically to make it a plea to the jurisdiction, not of the cause of action in Nevada, but to the cause of action in the State of California. And if Miller & Lux had *expressly* stated a cause of action in the water in the State of California, such plea would have been sustained.

The next sentence is also predicated upon the same conception:

“Complainant must be permitted to proceed upon the case made by its pleadings and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant.”

It is observed that the Court uses the words “can not defeat the jurisdiction.” That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: “It may be said that the court “in Nevada has not the power to quiet the title of “the defendant in the State of California.” With this statement there is no controversy, but we do further contend that the court of Nevada, has no

power to quiet the title of the complainant, *Miller & Lux*, in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

"But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defendant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux*, and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of *Miller & Lux* in and to the water, and that the title of *Miller & Lux* is at all times the

subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant
 "has a right to set up its conflicting interests which
 "are in California as a defense against the attempt
 "of the complainant to have its title in Nevada
 "quieted, because the complainant's title in Nevada
 "must depend upon whether complainant has the
 "better title as against defendant *in the State of California.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of California is only another way of determining what is the title of Miller & Lux to the waters *in the State of California*. After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made

for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claim an easement in the stream from their ditch in Nevada to the source of the river. Rickey claims an easement in that part of the stream only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the answer and the cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title

“also quieted in the State of California.” We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either*, in the State of California. The Court then proceeds: “Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, through the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant’s appropriation, and if not, then to settle and quiet complainant’s title and rights thereto.”

Where? The statement admits that the inquiry is as to the respective rights of the parties in the stream in California. It tacitly admits the interest of both parties in that State, and an inquiry into those rights. Why, then, should the Court say that the inquiry is to determine Miller & Lux’s rights in the State of Nevada, when directly the inquiry is in fact and substance to determine what are Miller & Lux’s rights in the State of California. When the Court asserts that it can not adjudicate defendant’s rights to the stream in California, it at the same time asserts that it can not adjudicate Miller & Lux’s right to the stream in the same State. Yet an adjudication that defendant do not take water from the stream *in the State* of California, is an adjudication of the rights to water in that State in favor of the complainant.

The Court changed its viewpoint of the case. Sometimes it held fast to the fact that the subject of the action was the *asserted title of Miller & Lux* in the State of Nevada. Then the viewpoint shifted and argued as though the inquiry in the State of California was not as to the title of Miller & Lux, but was as to the title of the defendant. And it said, the inquiry is to determine defendant's rights in the State of California, so as to determine complainant's rights in the State of Nevada. We submit that the determination of Miller & Lux's rights in the State of California would determine as exactly what Miller & Lux's rights in Nevada were, as would the indirect process of determining what were the defendant's rights in the State of California. One method is direct to the purpose; the other is indirect by process of elimination. But at all times and under all circumstances the inquiry must be, and is: the asserted rights of Miller & Lux to the water. It never changes to an inquiry into defendant's title or rights at any place.

To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals, on pages 19 and 20, is based upon an assump-

tion of jurisdiction in the court and then further assuming a contention on the part of appellant that the answer of defendant attempts to limit or circumscribe the admitted jurisdiction, whereas the real contention is that the court has no jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise.

Let us assume for a moment that the court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the State of California. Then, what becomes of the doctrine of lis pendens?

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quieted is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell vs. Johnson*, 89 Fed., 556; *Hoge vs. Eaton*, 135 Fed., 411, and *Anderson vs. Bassman*, 140 Fed., 14. As the action in each of those cases was commenced in the State which was uppermost on the stream, it would follow, under the announcement in this case, that the court did not have jurisdiction, because the

law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points the argument that the appropriator in the State of Nevada by being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux vs. Haggin, supra*), so that in inquiring into the rights of appellant in the State of California to the water, you are at the same time inquiring into that which is a part and parcel of its land. As against such upper riparian owner taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in

the stream according to the laws of the particular State in which the rights are asserted.

Barney vs. Keokuk, 94 U. S., 324;

Parker vs. Bird, 137 U. S., 661;

Hardin vs. Jordan, 140 U. S., 371.

Such court cannot administer a common law exclusively appropriation, or exclusively riparian, to conform to the laws of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation*, and to adjudge and command accordingly, ignores absolutely the riparian rights which are a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself.

There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and what is the thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the *title*

of *Miller & Lux* in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what Miller & Lux's rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of Miller & Lux in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens*.

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is Miller & Lux's title in Nevada, then to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of*

California, then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants, in order to apply the doctrine of *lis pendens*, that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction, the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens*, the thing, subject of the suit, is in the State of California.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First, an action the subject matter of which is in the State of Nevada. Secondly, there is attempted to be presented, between Rickey and Miller & Lux, an issue as to water in the State of California, viz., Miller & Lux's right to water *in the State of California*, of which the Court has no jurisdiction.

The trouble arises in attempting to apply the rule of *lis pendens* in a case where jurisdiction of a subject matter does not exist.

If the court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of California, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals, which deal with abstraction so far as the conclusions of that court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

Therefore, we respectfully submit that the actions commenced by petitioner in California did not, and

could not, present the same issues as were presented by the actions commenced by respondent in Nevada for the reason that the Court sitting in Nevada has no jurisdiction to try any issue presented in the California actions.

Wherefore, the Court below erred in making the decree herein.

Respectfully submitted. **F. D. MCKENNEY,**
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

MAR 4 1908

JAMES H. McKENNA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE
COMPANY,

Petitioner,

vs.

MILLER & LUX,

Respondent.

No. 643

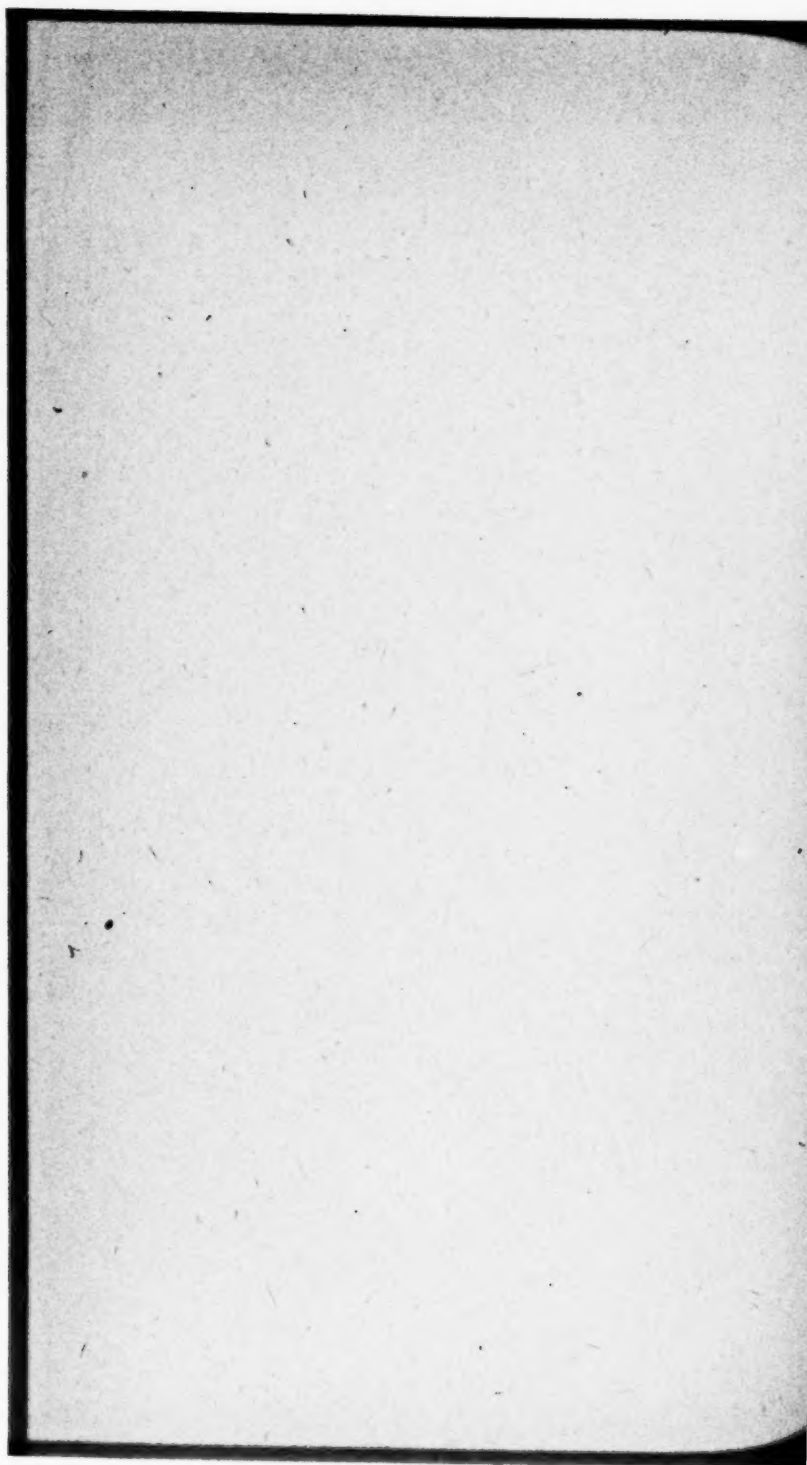
RESPONDENT'S BRIEF ON MOTION FOR *CERTIORARI.*

W. B. TREADWELL,
For Respondent.

Filed this day of, 1907.

.....
Clerk.

By.....
Deputy Clerk.



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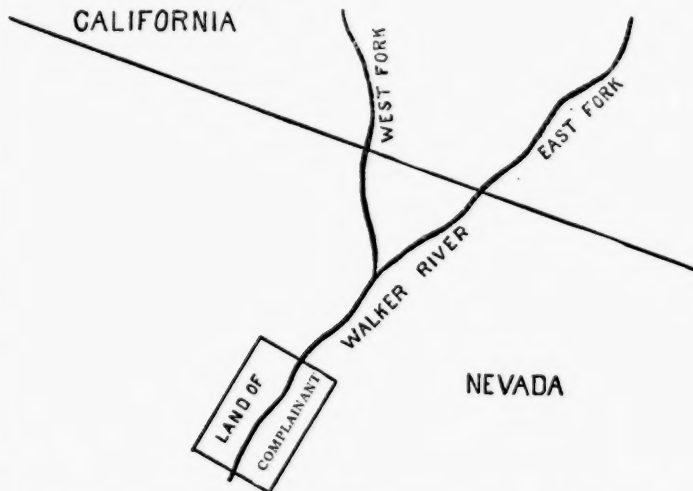
MILLER & LUX,

Respondent.

RESPONDENT'S BRIEF ON MOTION FOR
CERTIORARI.

The respondent (appellee in the court below) does not desire to oppose the application of the appellant for a writ of *certiorari*; but, on the contrary, it is solicitous that the writ should be granted, although its reasons for that preference are different from those urged by the petitioner.

The central question upon which depends the decision of the Circuit Court of Appeals, for the review of which a *certiorari* is now sought, is, Whether, given the requisite diversity of citizenship, a Circuit Court of the United States has *jurisdiction* of a bill in equity to enjoin a citizen and resident of the State and District in which the court sits, and who has been personally served with process in that District, from diverting water, in another State, from a river which flows through the latter State and into the former, to the injury of real property situated in the former. The nature of the question and the way in which it arises will be more clearly seen by reference to the following diagram and statement:



Complainant (respondent here) brought a suit in the Circuit Court of the United States for the District

of Nevada, against a number of citizens of Nevada, and, among others, against one Thomas B. Rickey, (petitioner's grantor,) who was a citizen and resident of Nevada, and who was personally served with process in that District. The bill alleged that complainant owned a tract of land in Nevada, (shown on the diagram) and had certain rights to irrigate that land with the water of Walker River, which flows through it, and that the defendant Rickey was wrongfully diverting water from said river, above complainant's land, to the injury of that land and of complainant's rights. The prayer was for an injunction to restrain that diversion. The defendant Rickey put in a plea to the jurisdiction, alleging that his diversions were being made solely in California. The Circuit Court overruled that plea.

Thereupon the petitioner (which was a purchaser *pendente lite* from Rickey) brought two suits in a California State court against complainant and others to have it adjudged that it had the right to make the diversions complained of in the prior suit in the U. S. Circuit Court. The Circuit Court, on the ground of its prior jurisdiction of the controversy, issued an injunction, *pendente lite*, restraining the further prosecution of the suits in the State court. From that order, the appeal here in question was taken, and the Circuit Court of Appeals affirmed the order.

That ruling we confidently believe to be correct; but we also believe that it would be proper for this Court to issue the writ now sought, without stopping

to inquire whether the decision of the Circuit Court of Appeals is correct or not.

The question involved, going, as it does, to the *jurisdiction* of the Circuit Court, will ultimately be subject to review by this Court upon appeal from the final decree when rendered. That question is one of gravity and importance, which is, with increasing frequency, presenting serious difficulties and conflicts of decision in both Federal and State courts, which can not well be removed until there has been an adjudication by this Court.

The decision of the Circuit Court of Appeals was, it is true, on an appeal from an order on an interlocutory application, and not from a final decree, and did not, in terms, dispose of the whole matter. But that decision did *practically* conclude the whole controversy; and the record was such that that court might have done so formally. There is therefore nothing in the condition of the case to create any difficulty in the way of issuing a *certiorari*.

Harriman v. Northern Securities Co., 197 U. S. 244.

Moreover, the granting of the writ is necessary "to prevent extraordinary inconvenience and embarrassment in the conduct of the case," and to avoid "possibilities of conflict and collision,"—which are good reasons for its issuance.

Am. Constr. Co. v. Jacksonville etc. Co., 148 U. S. 372;

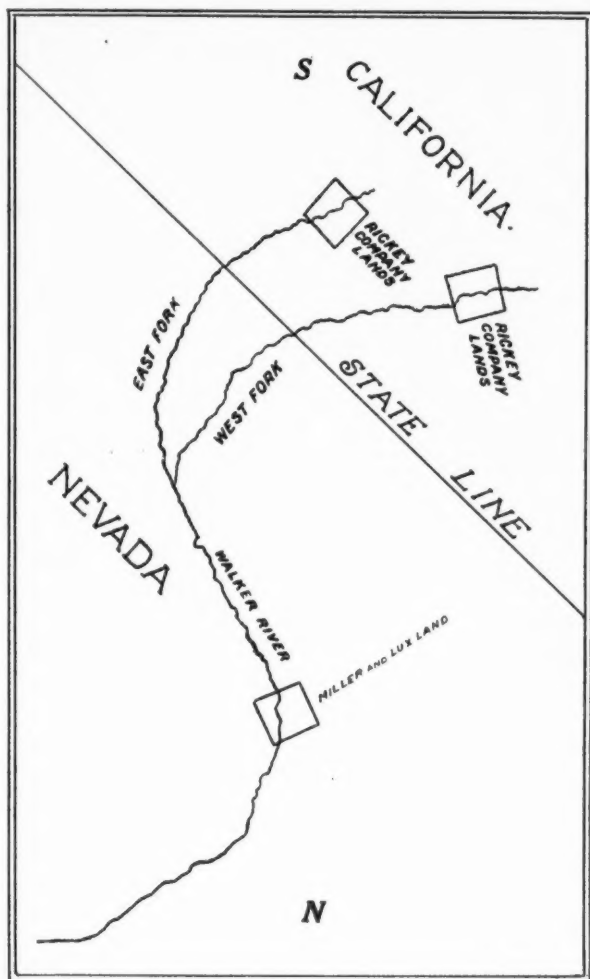
Forsyth v. Hammond, 166 U. S. 506.

It would seem that where, as here, conflicting suits are pending in courts of rival jurisdictions, of which this Court is the only common arbiter, it would be an unreasonable hardship to compel the parties to proceed, at enormous expense, to litigate their rights in either court, at their peril, when a decision, which this Court is unquestionably now *competent* to render, would avoid that peril, and remove the source of such unseemly conflicts. So far as the question of jurisdiction is concerned, this case is now ripe for a final decision, and the record presents everything necessary to that end.

While, therefore, we entertain no doubt of the correctness of the decision now sought to be reviewed, we submit that it is not necessary, in considering the present application, to enter upon any discussion as to the correctness of that decision. Whatever be the view which might now be taken as to that question, we think that it is one which ought to be determined by this Court in a final and authoritative manner, that is, upon a regular hearing upon the merits. We therefore desire to be understood as not opposing the present application for *certiorari*, but as desirous that that application should be granted.

Respectfully submitted,

W. B. TREADWELL,
For Respondent.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No.

RICKEY LAND AND CATTLE COMPANY, A CORPORATION, PETITIONER,

vs.

MILLER & LUX, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONER.

The proceedings herein are prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for the District of Nevada, enjoining petitioner from prosecuting two actions in the Superior Court of Mono County, State of California, on the ground, that the necessary effect of the prosecution of said actions would be, *to bring on for trial and determination the same issues as theretofore had been tendered by a certain action brought by respondent in the United States Circuit Court for the District of Nevada*, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will

be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California, wherewith to irrigate its said lands.

Respondent owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in the State of Nevada wherewith to irrigate said lands.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the District of Nevada against one Thomas B. Rickey and 137 other defendants, and alleged that it was the owner, by appropriation, of certain rights in the waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting water from the Walker River and depriving it of the waters to which it was entitled (Trans., pp. 2 and 3, folios 3, 4, 5, and 6).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the District of Nevada, setting up the facts that the Walker River rises in the State of California and flows through said State and therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irrigation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker

River in the State of Nevada (Trans., p. 2, folio 3, Miller & Lux vs. Rickey *et al.*, 127 Fed., 576).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the District of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 2, folio 4, Miller & Lux vs. Rickey, 127 Fed., 576).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 3, folio 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 4 and 5, folios 8-11).

Thereafter said Miller & Lux, respondent, brought this action in the United States Circuit Court for the District of Nevada, to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the sole ground *that the necessary effect of the two last-mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were tendered by the bill of complaint in the said original action of Miller & Lux vs. T. B. Rickey, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court in the said action, and thereby defeat the jurisdiction of the United States Circuit Court for the District of Nevada* (Trans., p. 7, folios 15, 16). An interlocutory order and decree restraining appellant herein from prosecuting said actions in the

California court was thereafter entered (Trans., p. 28, folio 64), and from such order and decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed (146 Fed., 574).

Certain of the questions involved in this case, and particularly the opinion of the Circuit Court of Appeals herein, were fully and carefully discussed in petitioner's brief in support of the petition for the writ of certiorari herein. In view of that fact and of the length it is foreseen an adequate presentation of the points herein to be covered will require, it is deemed advisable not to recapitulate the arguments presented in the previous brief, any further than may be essential to give continuity to the present argument, but to respectfully refer the court for such discussion to the said brief heretofore filed herein.

There is a single question involved in this petition. *It is as to the jurisdiction of the United States Circuit Court for the district of Nevada, in a local action, over water rights IN THE CALIFORNIA PORTION OF A STREAM, which stream rises in and flows through and out of the State of California into and through the State and district of Nevada.*

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were theretofore presented by the action commenced by respondent in the United States Circuit Court of Nevada (Trans., p. 7, folios 15, 16).

We desire to argue a single proposition, viz., **THAT THE ACTIONS COMMENCED BY PETITIONER IN CALIFORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE ACTION COMMENCED BY RESPONDENT IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS, or vice versa.**

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court, must necessarily situate exclusively within the State of ~~California~~ Nevada, and thus the only issues presented by said action are as to respondent's title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California, cannot be the same issues as are presented in the Nevada actions, which are as to the title to a different realty, situate in Nevada.

It is well-settled, that a Federal court, in enjoining an action begun in a State court, does not proceed on any of the ordinary equitable grounds of relief, as that the prosecution of the action in the State court is contrary to good conscience, or involves a multiplicity of suits, etc. By virtue of the limitations of the statute, the Federal court has no jurisdiction to consider any of these questions in an action to enjoin the prosecution of an action in a State court. The power of the Federal court is limited to protecting its own jurisdiction already acquired; it being deemed an impairment of the jurisdiction of the Federal court to have the same issues and subject-matter, which have once been tendered and litigated

in said court, thereafter tendered for litigation, by the same parties, in a State court.

Sec. 720, Rev. Stats.

Bates' Fed. Eq. Pro., Sec. 541.

Buck *vs.* Colbath, 3 Wall., 334.

Fisk *vs.* Union Pac. R. R. Co., 10 Blatch., 518.

Abell *vs.* Culberson, 56 Fed., 329.

Northern Pac. Co. *vs.* Cannon, 49 Fed., 517.

Cen. Trust Co. *vs.* Western R. Co., 112 Fed., 471.

Terre Haute Co. *vs.* Peoria Co., 82 Fed., 945.

Thus, it is conceded, that the finding of fact which is the basis for the issuance of the injunction granted herein was that the actions in Mono County, California, tendered the same issues for determination as had theretofore been tendered for determination, in the Circuit Court for the district of Nevada, in the action of Miller & Lux *versus* Rickey *et al.* From this finding the legal conclusion was drawn that the prosecution of the actions in the California court conflicted with the jurisdiction theretofore acquired by the Federal court sitting in Nevada.

Was this finding of fact warranted either by the pleadings or the evidence or both?

THE PRIMARY QUESTIONS OF FACT ARE, WHAT ARE THE ISSUES THAT WERE PRESENTED BY THE ACTIONS COMMENCED RESPECTIVELY BY THE RICKEY LAND AND CATTLE COMPANY IN MONO COUNTY, CALIFORNIA, AND BY MILLER & LUX IN THE CIRCUIT COURT SITTING IN NEVADA.

These will be considered in order.

The actions commenced by the Rickey Land and Cattle Company in California were to quiet title to certain water rights in the Walker River in Mono County, California (Trans., pp. 5 and 6, folios 10-14). The subject-matters of those actions were those water rights, which were realty in

California. The only issues presented in the actions commenced by petitioner in California were as to the title to those water rights, realty in said State. On this question there has been no conflict. Neither the courts below, or counsel, have suggested that the court had, in the actions commenced by petitioner in that State, jurisdiction over any subject-matter in the State of Nevada; or that it was sought to determine any issues, as to the title to any subject-matter, located in the State of Nevada, or anywhere outside of the county of Mono, State of California; or that the subject-matter of the California suit was anything other than realty situated exclusively in Mono County, California.

The issues presented in the actions commenced by petitioners in California, being as to, and confined to, the title to certain realty, located exclusively, in Mono County, said State; *what are the issues presented, in the original action, commenced by Miller & Lux against Thomas B. Rickey, in the State of Nevada?*

Complainant, in its original bill filed against T. B. Rickey, alleged, that it was the owner by appropriation, of the right to divert certain of the waters of Walker River in the State of Nevada, for use on its lands in said State. That Thomas B. Rickey and others, without right, were diverting waters at a point higher up on said stream, and depriving complainant of the water it was entitled to divert. An injunction, restraining defendant Rickey, from further trespassing on complainant's said right, is prayed for.

Preliminary to determining what are the issues presented by the bill of complaint in this action, is the question—what is the subject-matter of this action?

We can readily determine all possible property and rights that may be the subject-matter of this action. It may be, what we will term property right number *one*, viz: The land of complainant in Nevada, or something that so inheres in complainant's said land, as to be part and parcel thereof, and have its locus therein and be indistinguishable, and insepar-

able therefrom (This view was announced by the Circuit Court in the opinion on the plea, and by the Court of Appeals in this case).

Miller & Lux v. Rickey, 127 Fed., 573.

Miller & Lux v. Rickey, 146 Fed., 573, #

152 " 11

It may be, *Two*—property right Number one, *plus*, a right appurtenant to complainant's said lands, which inheres and has its locus, in the stream of the Walker River, from the point in said stream where complainant diverts said water, up said stream, to the boundary of the State of Nevada, which is the boundary of the district of the Federal Circuit Court, sitting in Nevada—or,

It may be *Three*,—property right Number one, *plus*, a right appurtenant to complainant's said lands, which inheres in and has its locus, in the stream of the Walker River, from the point in said stream where complainant diverts its said water, up said stream through the State of Nevada to and across the boundary of the State and district of Nevada, into and through the State and district of California, to the source of said Walker River.

We will discuss these property rights in the above order, assuming each in turn to be the subject-matter of this action, and on each assumption, determine the issues that are presented by the action, *and ascertain in each case, whether the issues so disclosed, are in whole or any part, the same issues, as those that were presented by the actions commenced by petitioner, in Mono County, California.*

PROPERTY RIGHT NUMBER ONE, which both the Circuit Court and the Court of Appeals, declared in their respective opinions, to be the subject-matter of the original action commenced by complainant in the district of Nevada, consists of the lands of complainant in Nevada, or something that so inheres and has its locus in complainant's said land, as to be part and parcel thereof, and indistinguishable and inseparable therefrom.

The action was brought, to enjoin a trespass on this property. Obviously, the one basic issue there presented, was as to the ownership or title to this property of complainant in Nevada. But was this issue presented by respondents, in the actions commenced in California? Equally obviously not. The issues presented in the California actions, were as to the title to a property situate exclusively in California, whereas any issues presented as to the subject-matter described as property right Number One, were as to the title to a property, situate exclusively in Nevada. The two issues may be of a similar nature, being each as to the title to property of a similar character; but the similarity of these two properties, one located exclusively in the State of California and the other located exclusively in the State of Nevada, does not make them the same property, or the issues, as to the title to each, the same issues.

Counsel will probably argue, and it seems to have been the view of the Circuit Court and the Court of Appeals, that the acts of defendant Rickey, which injured complainant's said lands and property in Nevada, and which are sought to be enjoined in said original action, were acts in California, in conjunction with the said property rights in California, which are the subject-matter of the California actions. That the purpose and scope of the said California actions, is to establish and quiet the right of this petitioner, as the successor of said T. B. Rickey, to continue these said acts in California, which produce injury and harm onto complainant's said property in Nevada.

Let us so assume the scope and purpose of said California actions to be. To make the case as strong as possible, let us assume that petitioner, by his said actions in California, is seeking to quiet its title to a right to do, in California, acts, that work positive and affirmative injury to complainant's said property in Nevada: as for instance, to roll stones from a vantage point in the State of California, down onto complainant's lands in Nevada; or to turn waters, down from a

vantage point in the State of California, so that they flow onto and over and flood complainant's lands in Nevada; or to create noxious fumes and odors from some point in the State of California and cause the same to flow onto complainant's property in the State of Nevada, and thus injure and ruin the same for any useful purpose. Would such an action, commenced by petitioner in California, subject the petitioner to the restraint of an injunction, as interfering with the prior acquired jurisdiction of the United States Court sitting in Nevada? Manifestly not. There is a no more cardinal rule than that courts will not enjoin vain or void acts. That, as far as petitioner might, by any action instituted in the courts of California, attempt to quiet its title to a right to injure property, situate in the State of Nevada, its action would be both vain and void, is too clear to need the citation of authority. Petitioner might, in the courts of the State of California, quiet its title to roll stones or run water or flood gases over lands in the State of California; but there are no courts sitting in the State of California, that have jurisdiction to establish any right in petitioner, to roll stones, or run water, or flood gases onto lands, in the State of Nevada.

Conant vs. Deep Creek Irr. Co., 23 Utah, 627.

Guaranty Trust Co. vs. Delta, etc. Co., 104 Fed., 5.

Story on Conflict of Laws, 7th edition, sec. 543.

Carpenter vs. Strange, 141 U. S., 87-105.

Watts vs. Waddle, 6 Pet., 389.

Watkins vs. Holman, 16 Pet., 25.

Corbett vs. Nutt, 10 Wall., 464.

Bates' Fed. Eq. Proc., secs. 70 and 75.

The courts of California, having no such jurisdiction, an attempted action in the courts of California, calling for the exercise of such jurisdiction, could by no possibility create a conflict with the jurisdiction of any court.

But counsel will probably reply, that the purpose of the actions instituted by petitioner in California, was not to quiet

its title to roll stones or run waters or flood gases on complainant's lands in Nevada, but to quiet its title to divert certain of the waters of Walker River in the State of California, which diversion lessened the flow of the waters of Walker River in the State of California; which as a consequence, lessened the flow of the Walker River in Nevada; which as a consequence, deprived complainant of water which it had a right to divert and use for the irrigation of its land in the State of Nevada; and that these are the very acts, which it is the purpose of complainant's original action to enjoin. Be that so, what do we there have as the subject-matters of complainant's original action? Not complainant's lands, or something inherent and inseparable from and having its locus in complainant's lands exclusively; but the right to have the water of Walker River, which petitioner is seeking to quiet its title to in California, flow down said river through the State of California into the State of Nevada, and down through the State of Nevada, to complainant's point of diversion on its lands.

This is the property right numbered *three* above, as a possible subject-matter of complainant's said action. As the consideration at this present point, is confined to the determining of the possible issues that complainant's original bill may present, having the property right above described as number *one* as its subject-matter, we will postpone any discussion of the issues that complainant's original bill, viewed as having said property number *three*, as its subject-matter, until we reach that stage of our argument.

Assuming then, that the subject-matter of the original action, commenced by complainant, in the Federal court sitting in Nevada, was complainant's lands in Nevada, or something inherent in and having its locus in said lands, existing as part and parcel thereof, we respectfully submit, that no issues that were or could have been tendered, as to this subject-matter, are, or could have been, the same issues, as were tendered, by petitioner's said actions in California.

WE COME NOW, TO A CONSIDERATION OF THE POSSIBLE ISSUES, THAT MAY HAVE BEEN TENDERED IN COMPLAINANT'S ORIGINAL ACTION, ON THE ASSUMPTION THAT COMPLAINANT'S SAID ACTION HAD, AS ITS SUBJECT-MATTER, THOSE PROPERTY RIGHTS HEREIN SET OUT AND DESIGNATED AS NUMBER TWO, viz., property right number *one*, plus a right appurtenant to complainant's said land, which inheres and has its locus in the stream of the Walker River, from the point in said stream, where complainant diverts its said water, up said stream, to the boundary of the State of Nevada, which is the boundary of the district of the Federal court sitting in Nevada.

This property right, likewise exists and has its locus, exclusively within the district and State of Nevada. The previous discussion has demonstrated, that no issues that could be tendered, as to the title to a subject-matter lying exclusively within the State and district of Nevada, are, or could be tendered, by those axions, in the court sitting in the State of California; which, it is conceded, have for their subject-matter, the title to properties situate wholly within that State.

The fact, that the object of the California actions, is to establish petitioner's right, to divert water from the Walker River within the State of California, which will have the consequent effect, of lessening the flow of water in the Walker River down through the State of California, to the boundary line between California and Nevada; which will have the further consequential effect, of lessening the flow of said river, down through the State of Nevada, relates exclusively to the consideration of property right *number three*, and does not increase any of the possible issues that may be tendered as to the title to the property rights herein designated as *number two* exclusively.

WE COME NOW, TO POSSIBLE SUBJECT-MATTER HEREIN-ABOVE REFERRED TO, AS PROPERTY RIGHT NUMBER THREE which is, viz., property right number one, that is, a right.

having its locus in and being part and parcel of complainant's lands; plus a right or interest, appurtenant to said lands in Nevada, and inherent and located in the stream of the Walker River, from complainant's point of diversion, up said stream through the State of Nevada, to and across the boundary between Nevada and California, and through the State of California, to the source of the stream.

It is clear, that if rights inherent in the stream of the Walker River in the State of California, are a part of the subject-matter of the original action commenced by complainant in Nevada, and that complainant presented issues in said action, as to the title to said rights and interests in California; then the conclusion may be drawn that petitioner, in seeking to quiet his title to its rights in said stream in California, has presented the same issues, as were theretofore presented by complainant. *Thus the consideration, of whether rights inherent in, and having their locus in, the stream of the Walker River in California, are a part of the subject-matter of said original action, commenced by complainant against Thomas B. Rickey in Nevada, is vital in this case.*

In other words, the supreme question in this case is: DID THE UNITED STATES CIRCUIT COURT, SITTING IN THE STATE AND DISTRICT OF NEVADA, ACQUIRE, BY VIRTUE OF THE FILING OF THE BILL IN THE CASE OF MILLER & LUX vs. RICKEY, JURISDICTION, OF RIGHTS AND INTERESTS, INHERENT IN AND LOCATED IN THE STREAM OF THE WALKER RIVER, IN CALIFORNIA?

Water rights, in a natural stream are real property, and an action to enjoin a hostile diversion, is an action to enjoin a trespass on real property; or to put it more accurately, is an action to quiet and establish a title to real property, which carries with it the ancillary relief of an injunction. This rule is conceded by counsel, and was announced by the Circuit Court of Appeals in this case (*Rickey L. and C. Co. vs.*

Miller and Lux, 152 Fed., 11), and has been declared without conflict by practically every court in the land.

Union Mill, etc., Co. *vs.* Dangberg, 81 Fed., 73, and cases cited.

Wiel on Water Rights, 2d ed., § 65.

The question before this court, then, assumes this general form: HAS A CIRCUIT COURT OF THE UNITED STATES, SITTING IN ONE STATE AND DISTRICT, JURISDICTION IN THIS FORM OF AN ACTION, TO ENJOIN A TRESPASS, ON REAL ESTATE SITUATE IN ANOTHER STATE AND DISTRICT?

The distinction between local and transitory actions, exists, as much in equity as at law, and an action to enjoin a trespass on real estate, is a local action.

This proposition, was denied by counsel in the courts below, but was announced by the Circuit Court of Appeals in this case (152 Fed., 11), and is supported by all the authorities cited in the opinion, as well as by the leading case of the Northern Indiana Railway Company *vs.* The Michigan Central Railway Co., 15 Howard, 233, and by the following authorities:

Stillman *vs.* White Rock Mfg. Co., 23 Fed. Cases, 83, No. 13446.

Morris *vs.* Remington, 1 Parsons (Penn.), 387.

Bump on Fed. Prac., p. 138.

Angel on Water Courses, 7th ed., par. 418.

Enc. of Pleading and Prac., vol. 22, p. 1158.

Gould on Pleadings, p. 112.

The Company of The Mersey *vs.* Irwell Mfg. Co., 2 East, 498.

U. S. *vs.* Rio Grande Dam, 174 U. S., 690.

Bates' Federal Equity Proc., sec. 71.

U. S. *vs.* Winans, 73 Fed., p. 72.

Pomeroy, Eq., Jrsp., secs. 298 and 1318.

Miss. & Mo. R. R. Co. *vs.* Ward, 67 U. S., 485.

Lewin on Trusts, vol. 1, p. 130, star pages 48 and 49.

- Norris *vs.* Chambers, 29 Beaven, 246; same, 3 De G. and F., 583.
- Dicy on Conflict of Laws, p. 214.
- Harrison *vs.* Harrison, Law Rep., 8 Chancery Appeals, 342.
- Jenkins *vs.* Lester, 131 Mass., 355.
- Bates on Fed. Eq. Proc., vol. 1, sec. 75.
- Huntington *vs.* Atrol, 146 U. S., 657.
- Greely *vs.* Low, 155 U. S., 58, 76.
- Story's Conflict of Laws, 7th ed., sec. 543, p. 685.
- Atlantic Dredging Co. *vs.* Bergnock R. R. Co., 44 Fed., 208.
- People *vs.* Colo. R. R. Co., 42 Fed., 638.
- Atlantic, etc., Tel. Case 46, N. Y. Superior Court, 377.
- Western Union Tel. Co. *vs.* Western R. R. Co., 8 Baxter (Tenn.), 54.
- Marshall *vs.* Turnbull, 34 Fed., 827.
- Western Union Tel. Co. *vs.* Pacific & Atlantic Co., 49 Ill., p. 90.
- Fargo *vs.* Redfield, 22 Fed., 373.
- Port Royal R. R. Co. *vs.* Hammond, 58 Ga., 523.
- Linsey *vs.* Silver Star Mining Co., 66 Pac., 382.
- Texas, etc., R. R. Co. *vs.* Gay, 86 Texas, 571.
- Guar. Trust Co. *vs.* Delta, etc., Co., 104 Fed., 5.
- Balto. B. & L. Ass'n *vs.* Alderson, 90 Fed., 142.
- Carpenter *vs.* Strange, 141 U. S., 87.
- Farmers' Loan & Trust Co. *vs.* Northern Pac. R. R. Co., 69 Fed., 871.
- Washburn on Easements, 3d ed., 692.
- Smith's Leading Cases, p. 1034.
- Enc. Pleading & Prac., vol. 14, pp. 1122 and 1106.
- Gilbert *vs.* Water Power Co., 19 Ia., 319.
- People *vs.* Central R. R. Co., 42 N. Y., 283.
- Wood on Nuisances, 3d ed., sec. 830.
- Horn *vs.* City of Buffalo, 49 Hun., 76.
- Buck *vs.* Ellenbolt, 84 Ia., 394.

Section 742 of the Revised Statutes speaks of a "*suit of a local nature in law or in equity.*"

With the two exceptions, immediately hereinafter noted, the jurisdiction of a Federal court, in a local action is confined exclusively to real property situate within the territorial limits of the court's judicial district. This is a fundamental rule applying to all courts.

Northern Indiana R. R. Co. *vs.* Michigan Central R. R. Co., 15 Howard, 233.

Livingston *vs.* Jefferson, 1 Brock, 203.

Fed. Case No. 8, 411.

McKenna *vs.* Fiske, 1 Howard, 241.

Massey *vs.* Watts, 6 Cranch, 148.

Conant *vs.* Deep Creek Irr. Co., 23 Utah. 627; 66 Pac., 188.

Davis *vs.* Headley, 22 New Jersey Eq., 115.

Carpenter *vs.* Strange, 141 U. S., 105.

Guar. Trust Co. *vs.* Delta Co., 104 Fed., 5.

Story on Conflict of Laws, 7th ed., p. 685.

Watts *vs.* Waddle, 6 Pet., 389.

Watkins *vs.* Lessee, 16 Pet., 25.

Corbett *vs.* Nutt, 10 Wall., 464.

Boyce *vs.* Grundy, 9 Pet., 275.

Balto. Ass'n *vs.* Alderson, 90 Fed., 142.

Farmers' L. & T. Co. *vs.* Northern Pac. R. R. Co., 69 Fed., 871.

Bates' Fed. Eq. Proc., secs. 70-75.

Texas & Pac. R. R. Co. *vs.* Gay, 86 Texas, 571.

Pine *vs.* N. Y., 185 U. S., 93.

People *vs.* Central R. R. Co., 42 N. Y., 283.

One exception above referred to is expressed in the special congressional enactment, section 742, Revised Statutes, which reads:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed

character, lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in a circuit or district court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

In *para materia* with section 742 may be read section 738 of the Revised Statutes as amplified by section 8 of the Judiciary Act of March 3, 1875.

Section 738 of the Revised Statutes provides for substituted service of summons in suits "in equity to enforce any legal and equitable lien or claim against real or personal property within the district where the suit is brought" and provides "*but the said adjudication shall * * * affect his property within such district only.*"

Section 8 of the Judiciary Act of March 3, 1875, chapter 137, 18 Stat. L., 470, amplified the above jurisdiction by omitting the last word *only*, and including certain other claims and demands, and adding, "*And when a part of the said real or personal property * * * shall be within another district, BUT WITHIN THE SAME STATE, said suit may be brought in either district in said State.*"

These statutes clearly point the rule. The words "WITHIN THE SAME STATE," and, "BUT WITHIN THE SAME STATE," in these two statutes, limit the power of the court. In the case at bar, a part of the property over which it is necessary to establish the jurisdiction of the Federal Court, in the action of Miller and Lux *vs.* Rickey, is within the limits of another State, viz. California, and beyond the jurisdiction of the Courts in Nevada.

The other exception is contained in a special Act entitled "An Act to prevent unlawful occupancy of public lands," 23 Stat. L., 321. Section 2 thereof provides * * * "And jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having

jurisdiction over the locality where the land enclosed *or any part thereof shall be situated*, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act." This special act, designed to convey a special jurisdiction; to restrain the unlawful enclosure of public lands, seems to convey a jurisdiction in any United States Court, where a part of the land shall be situated, to enjoin the fencing of all portions of the enclosure, even though some portion thereof may be in another State.

As this is neither a suit, by the Government to enjoin the unlawful occupancy of public lands, or a suit, involving a subject-matter, lying partly in one district and partly in another district, "~~BUT WITHIN THE SAME STATE,~~" neither of these two exceptions apply; and it remains, that in the case of *Miller and Lux vs. Rickey*, the Federal Court sitting in Nevada had no jurisdiction over rights and interests inherent in and located in the stream of Walker River, in the State of California. Wherefore, we are compelled to lop off, as beyond the jurisdiction of the Court in Nevada, all that portion of the aforesaid possible subject matter, designated as property *number three*, described and referred to, as a right and interest, appurtenant to complainant's lands in Nevada, but inherent and located in the stream of the Walker River, where it flows exclusively in and through the State of California.

Thus pruned, we have possible subject-matter *Number three*, identical with possible subject-matter *Number two*. But with the subject-matter of the original action of *Miller and Lux vs. Rickey*, thus limited to rights located exclusively in the State of Nevada, we have already seen there remains no possibility for the presentation of the same issues as were tendered by the commencement of actions having as their subject-matter rights in realty, located exclusively within the State of California.

Counsel have not been slow to recognize the force of these facts, that drive to the foregoing conclusion. From the very outset of this litigation, counsel have met the issue squarely, with the unqualified contention, that there is no such a thing as a local action in equity—that equity acts solely *in personam* and therefore necessarily, all actions in equity are transitory. Counsel below, on the plea of Thomas B. Rickey to the jurisdiction of the Circuit Court sitting in Nevada to enjoin him from diverting water in the State of California, placed the burden of his argument on the proposition, that all actions in equity are transitory, and recognizing the flat conflict with the decision of this court in the case of the Northern Indiana Railroad Company *vs.* the Michigan Central R. R. Co., 15 Howard, 233, stated in his opening argument, that he expected to show that that case had been overruled by later decisions of this court.

Judge Hawley, in opening his opinion on the plea, said—“It may be said that the questions involved in defendant’s plea cluster around the single proposition as to whether or not the suit is of a local or transitory nature” and concluded his opinion with the following language—“The jurisdiction of courts of equity over the classes of cases effecting property situate without its local jurisdiction exists only when the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction. That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction and punish him for contempt if he violates it.” *Miller & Lux vs. Rickey*, 127 Fed., 576-580.

In the Northern Indiana R. R. Case it might also have been said with equal effect—“that this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction and punish him for contempt if he violates it.” But this court did not so say, and could not have so said, and dismissed for lack of jurisdiction the action which only asked for the process of an injunction against a person within the jurisdiction of the court.

Assuming that the Circuit Court, in the *Miller & Lux vs. Rickey* case, held that by virtue of service of process on defendant Rickey, it had jurisdiction to enjoin him with reference to property situate beyond its jurisdiction; that case is squarely in conflict with the Northern Indiana R. R. case and all other cases cited. Assuming that it was the holding of the Circuit Court that the acts of Rickey in California were productive of injury to complainant's property in Nevada, as may be gathered from this sentence, quoted from the opinion, page 576: "The injury for which redress is sought in the bill of complaint, is an injury to complainant's land situate in the State of Nevada"—and that thus the subject-matter of the action was exclusively real property in Nevada, over which the Court has jurisdiction; then, as we have above seen, there was no room for a conflict of jurisdiction to arise from the bringing of a suit to quiet title to realty situate exclusively in California. The Rickey Land and Cattle Company could not in any court of California quiet its title to injure Miller & Lux's land in Nevada.

Judge Hawley expressly overlooked and set aside the distinguishing feature set out in the Northern Indiana R. R. case. He said, to quote further from the opinion on the plea, page 580, "The reference is these opinions to contracts, trusts or fraud, was not intended to limit the jurisdiction to such cases only."

Chief Justice Marshall, in *Massey vs. Watts*, 6 Cr., 148, after extensively citing authorities, where courts of equity had held jurisdiction of actions indirectly affecting foreign real estate, on the sole grounds of some relation of privity between the parties growing out of a contract or a trust or a fraud, in determining the jurisdiction of the Court, stated the pivotal question as follows: "*The inquiry, therefore, will be, whether this is an unmixed question of title or a case of fraud, trust or contract.*"

After considering and quoting from the authorities at

length, Justice McLean, in the Northern Indiana R. R. case said, page 243:

"The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied,"

and therefore concluded that, as the property which the injunction was sought to protect lay outside the district, that the case was not one where

"the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree."

The most learned text writers in our law have pointed this distinction to be the decisive question in this character of cases.

Wharton in his Conflict of Laws, 2d ed., section 288, thus states the rule:

"In order to enable a court of equity to compel a party subject to such court to perform acts in reference to foreign real estate, there must be a *fiduciary relation* between the party on whom the decree acts and the party asking for the decree."

We quote from Lewin on Trusts, v. 1, p. 129, star pages 48-49:

"As to land lying within a foreign jurisdiction, the court will enforce natural equities and compel the specific performance of contracts, provided the parties be within the jurisdiction and there be no insuperable obstacle to the execution of the decree."

Here follows a series of illustrations, all being cases where there existed a personal privity between the parties. The author then sums up as follows:

"In such cases, however, the courts, according to the modern doctrine, require as a substratum for its jurisdiction that there should exist a *personal privity* between the plaintiff and the defendant."

The English Chancellors, than whom, says Judge Story, no one has gone further to extend and broaden the limits of equity jurisdiction, have held themselves bound by this rule, although in every case where the question has arisen the defendant resided or was found within the jurisdiction of the court.

The case of *Norris vs. Chambers*, 29 Beaven, 246, Cases in Chancery, is in point. The Chancellor, after citing the rule laid down by the case of *Penn. vs. Lord Baltimore*, 1 Ves. Sen., 444, and other later authorities, continued:

"I am not disposed, however, to go a step further than these cases warrant and demand. On examining them I find that *in all of them, a privity existed between the plaintiff and the defendant*. They had EITHER ENTERED INTO SOME CONTRACT OR SOME PERSONAL OBLIGATION HAD BEEN *incurred moving directly from one to another*. In this case I cannot find that anything of that sort exists."

As the real estate was in Germany, the action was dismissed for want of jurisdiction. The case was appealed, and the Lords Justice, through Lord Chancellor Campbell, in 3 De G. & F., 583, in a strong opinion affirmed the case and recognized the rule.

HAS IT EVER BEEN CONTENDED THAT A TRESPASS CREATES A PRIVACY BETWEEN THE TRESPASSER AND THE OWNER OF THE PROPERTY?

Dicey, in his work on the Conflict of Laws, pages 214, 216, speaking of the High Courts of England, announces the rule as follows:

"In respect of Subject-matter.

Rule 39—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

(1) The determination of the title to, or the right

to the possession of, any immovable situate out of England, or—

(2) The recovery of damages for trespass to such immovable."

Here follows a long list of illustrations.

"*Exception*—The Court has jurisdiction to entertain an action against a person who is in England respecting an immovable situate out of England (foreign land) on the ground of either—

(a) A contract between the parties to the action.

(b) An equity between such parties with reference to such immovable."

See also *Harrison v. Harrison*, Law Reports, 8 Ch. Appl., 342.

Jenkins v. Lester, 131 Mass., 355.

Authorities making this rule determinative of a court's jurisdiction in cases of this character, might be cited in sufficient number to fill a volume. A fair list of such decisions is given in the report of citations of the case of *Massey vs. Watts*, *supra*, found in Vol. 1, Rose's Notes, to the U. S. Reports, p. 420.

The language quoted by Judge Hawley from the case of *Phelps vs. McDonald*, 99 U. S., 298, as an authority to the effect that courts of equity may, in all cases where jurisdiction of the parties may be acquired by service of process, enforce its decrees *in personam*, even though they be in reference to real property beyond the jurisdiction of the court, must be construed in the light of, and in view of the application of the quoted language to the facts of that case. Language, which is perfectly proper to express power which a court can exercise in a case where it has jurisdiction, may be entirely inapplicable to a case, where the court does not have jurisdiction. In cases where the necessary jurisdictional facts exist, the court under all the authorities can act on the parties and enforce its decree *in personam*, even though they be in reference to real or personal property beyond the terri-

torial jurisdiction of the court. But in the absence of such jurisdictional facts there is no such power.

Phelps vs. McDonald was a case where, under all the general principles governing courts of equity hereinabove cited, the court had jurisdiction. The action was to have it decreed that chose in action and money due under the same, *was held in trust for the plaintiff*, as assignee in insolvency. The gravamen of the suit was founded in the *fraud* of the defendant. The court, after reciting the acts of fraud, alleged to have been perpetrated by the defendant, in acquiring the chose in action from the plaintiff said:

"Considering the sale in the light of this showing, we can not hesitate to hold it invalid" (page 305).

Phelps vs. McDonald was a transitory action of necessity, from the nature of its subject-matter, viz., a chose in action. It was a transitory action, further, by reason of the privity between the parties growing out of the transactions on which it was founded. Thus the court had jurisdiction of the controversy, and having jurisdiction, it had the unquestioned power to decree the relief as recited. This is in direct line with all of the authorities. The language quoted simply enumerated the powers of a court of equity already vested with jurisdiction. Any other construction renders the language a mere dictum, and foreign to any purpose in the case, and carries with it the necessary implication that this court went out of its way to pronounce on a proposition in no way before it for decision, and too, in a pure dictum, lay down a rule of jurisdiction, totally at variance to an unbroken line of decisions coming down through the centuries.

To treat the language quoted from *Phelps vs. McDonald* by Judge Hawley as a simple enumeration of the powers of a court of equity acting in a case where it has jurisdiction, is to assign to this language, a direct bearing on the case then before the court, and to read it in harmony with all

the previously decided cases. But to treat the language quoted, as a rule, giving courts of equity jurisdiction over foreign real estate in all cases where service can be had on the parties, is to charge that this court deliberately went out of its way, to, by the way of a pure dictum, reverse every decision it or any other court had rendered on this important subject.

The case of *Muller vs. Dows*, 94 U. S., 444, cited by Judge Hawley, was an action to foreclose a mortgage on a railroad, a portion of which was in another State. The court was, under all the decisions, vested with power to carry out, according to its terms, the contract of mortgage between the parties.

The case of *Cole vs. Cunningham*, 133 U. S., 137, was one, where the acts of the defendant were held to constitute a fraud on the plaintiff, and Chief Justice Fuller based the jurisdiction of the court on—

“The authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to stay acts contrary to equity and good conscience.”

We are aware, that there are three or four isolated cases in State courts, where courts of equity have overlooked the necessity of “an equitable sub-stratum between the parties” as essential to vest the court with jurisdiction, and have issued injunctions in reference to foreign real estate, in cases where there existed no privity between the parties. That in the multitude of causes pending before all the various courts in the fifty odd States constituting this Federal Union, with their various phases of facts, and the anxiety of courts to execute justice, a few such decisions should arise, which are based on an incorrect conception of the rule, is not surprising. The cases are few and isolated and the reading of any of them shows it to stand without warrant in any of the authorities therein expressly relied on; and while we are aware of the identity of these cases and of the probable intention

of counsel to cite them; we deem it unnecessary to tax the patience of this court by any more than a general reference to this inherent error existing in all these cases.

We feel that the foregoing consideration disposes of any contention, that a court of equity has jurisdiction to enjoin a pure trespass on foreign real estate, and thus can have issues tendered to it in such a case, as to title of foreign real estate by reason that such an action is transitory in its nature.

But despite all these positive rules of law and unquestioned authorities, suppose counsel should establish their contention, that the case of *Miller & Lux vs. Rickey* is a transitory action, involving issues indirectly affecting titles to rights in this stream in California; can there by any possibility be a conflict of jurisdiction created between the Federal Court in Nevada sitting in a transitory action decreeing *in personam* against T. B. Rickey in a case to use the language of Judge Hawley where "the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction," and any court in the State of California sitting in any kind of action? We respectfully submit that the rule is well settled that if the first suit "IS STRICTLY A SUIT IN PERSONAM IN WHICH NOTHING MORE THAN A PERSONAL JUDGMENT IS SOUGHT, NO REASON IS PERCEIVED WHY A SUBSEQUENT ACTION MAY NOT BE BROUGHT AND MAINTAINED IN ANOTHER JURISDICTION, ALTHOUGH IT INVOLVES THE DETERMINATION OF THE SAME ISSUE OR ISSUES ON WHICH THE RIGHT TO RECOVER IN THE FIRST SUIT DEPENDS. THE BRINGING OF SUCH SECOND SUIT, UNDER THE CIRCUMSTANCES SUPPOSED, DOES NOT OUST THE COURT IN WHICH THE FIRST SUIT WAS INSTITUTED OF ITS JURISDICTION, OR DELAY OR OBSTRUCT IT IN THE EXERCISE OF ITS JURISDICTION OR LEAD TO THE CONFLICT OF AUTHORITY."

Merritt vs. American Can Co., 79 Fed., 228, 232.

Stanton vs. Embry, 93 U. S., 548.

B. & O. R. R. Co. vs. Wabash R. R. Co., 119 Fed., 678.

Thus admitting the position of counsel and the Circuit Court below, that the action of Miller & Lux *vs.* Rickey was transitory and thus wholly within the jurisdiction of the Nevada Circuit Court, it with equal necessity follows that no case has been made calling for the issuance of the injunction restraining the prosecution of the action commenced by petitioner in California on the ground that the same conflicts with the jurisdiction of the court in Nevada.

In case of failure to sustain the decree entered herein with the contention that the action of Miller & Lux *vs.* Rickey was a transitory action, *counsel in the court below advanced the further contention, that this case was one in which the courts in the States of California and Nevada have concurrent jurisdiction of the subject-matter, by reason of what counsel terms the indivisible nature of the rights involved.* We quote from the brief of counsel in the Circuit Court of Appeals.

"The water right of complainant, then, which it seeks to protect, is, according to counsel, an *interest* in all the river above its land; including, it is true, that part of the stream in California, but equally including that part in Nevada. That right is, in its very nature, wholly indivisible; and, in such a case, the most defendant could claim would, under elementary principles, be that this suit might be brought in either State."

Thus counsel reasons, that the courts of the two States, having concurrent jurisdiction over the entire subject-matter of rights in this stream, when one court assumes this jurisdiction in an action properly commenced, it would be an infringement on its jurisdiction, for a court of the other State to, at the instance of one of the parties, or a privity of one of the parties to the original action, entertain any suit relating to rights in the stream.

As this argument, which has been termed that of the *indivisible res*, is based almost entirely on the nature of a

water right in a stream, and of complainant's water right in particular, it may well, preliminary to a close discussion of that contention, to ascertain the general nature of a water right, by assembling a few of its well-settled attributes.

The primary elements of a water right acquired by an appropriation of water from a natural stream have been defined as—

First. The right to have the water flow, unimpaired in quantity or quality, from its source, down the stream to the appropriator's point of diversion.

Second. Of the right to divert the water from the stream when it reaches its point of diversion.

Cole vs. Richards (Utah), 75 Pac., 376.

Black's Pomeroy on Water Rights, sec. 64.

Farnham on Waters, vol. 3, sec. 674.

Phoenix Water Co. *vs.* Fletcher, 23 Cal., 482.

Howell *vs.* Johnson, 89 Fed., 559.

Conant *vs.* Deep Creek Irr. Co., 23 Utah, 627.

Thus it is held that the right of an appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet is a substantial right and interest in the stream which the courts will protect.

Black's Pomeroy on Water Rights, sec. 64.

Duckworth *vs.* Watsonville W. & L. Co. (Cal.), 89 Pac., 338.

Cole vs. Richards (Utah), 75 Pac., 376.

Thus it has been unanimously held in Nebraska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Wyoming, and Hawaii, by all courts, that an appropriator can, at will, change his point of diversion and place of use of his water, provided only he does not by so

doing trespass on any of the rights of his neighbors to their injury.

See *Weil on Water Rights*, 2d edition, section 184, where fifty-four cases sustaining the rule are cited and not one *contra*.

Thus the Supreme Court of Colorado in a recent case—*Seven Lakes Reservoir Co. vs. New Loveland, etc., Irr. & L. Co.*, 93, Pac. 485—involving a sale of a water right and the change of its use from irrigation on one piece of land to storage for other uses, said:

“A priority to the use of water is a property right which is the subject of purchase and sale and its character and method of use may be changed.”

A water right “is the subject of property and may be sold and conveyed.”

Kinney on Irrigation, sec. 264, 5 cases.

Gould on Waters, sec. 234.

Pomeroy on Riparian Rights, sec. 58.

Not alone may the place of diversion and use of the right be changed, but the character of the use may be changed, as from irrigation to municipal purposes, or for power or storage.

Strickler vs. Colo. Springs, 16 Colo., 61.

City of Telluride vs. Davis, 33 Colo., 355.

Williams vs. Altnow (Ore.), 95 Pac., 200.

Wadsworth Ditch Co. vs. Brown, 88 Pac., 1060.

Irr. Co. vs. Reservoir Co., 25 Colo., 144.

Hallett vs. Carpenter, 86 Pac., 317.

Thus in Colorado, where the streams are divided into different water districts each of which is distinctly supervised, it has been held that the owner of a water right on a stream can change his point of diversion and user from one water district on the stream to another water district.

The court said:

"The right to change the point of diversion or place of use of water which has been obtained as the result of an appropriation, is one of the incidents of ownership."

Lower Latham Ditch Company *vs.* Bijou Irr. Company, 93 Pacific, 483.

A water right may exist independent of the ownership or possession of any land.

Wiel on Water Rights, 2d ed., § 63.

Santa Paula, etc., Works *vs.* Peralta, 113 Cal., 38.

Thus, this court has held that a water right can be owned by a corporation which owns no land.

Gutierrez *vs.* Albuquerque Land Co., 188 U. S., 555.

It is customary to speak of a water right as an appurtenance to some other estate. From the foregoing established characteristics of a water right it is clear that this is not necessarily so. Thus the Supreme Court of California has said:

"The water right is the principal thing, and if either is appurtenant to the other, the ditch is appurtenant to the water right."

Jacobs *vs.* Lorenze, 98 Cal., 340.

The Federal courts have held that interests in a stream in one State may be acquired by an appropriation from the stream in another State lower down.

Howell *vs.* Johnson, 89 Fed., 559.

Morris *vs.* Bean, 123 Fed., 618.

Hoag *vs.* Eaton, 135 Fed., 411.

Anderson *vs.* Bassman, 140 Fed., 14, 20.

Finally, it has been well said:

"It is settled in this arid region by abundant authority, that when the waters of a natural stream have been appropriated according to law, and put to a bene-

ficial use, the rights thus acquired carry with them an interest in the stream, from the points where the waters are diverted from the natural channel to the source from which the supply is obtained."

Cole vs. Richards (Utah), 75 Pac., 376.

From the foregoing citations it is clear that the owner of a water right in a natural stream, is the owner of real property that consists of an interest in the stream above him, which interest and right entitles him to divert and use from said stream at any point thereon and for any purpose or purposes he may see fit, a given amount of water. While the right may be appurtenant to real estate, it may be independent of the ownership of any real estate and is subject to purchase and sale.

Assuming, or rather conceding to complainants for the sake of this argument on the jurisdiction solely, that the interstate character of the Walker River did not in any manner limit the extent of the possible right or interest that was acquired by complainants' appropriation from the river in Nevada, complainants' rights so acquired consist—

1st. Of the right to have the water of Walker River flow, to the extent of respondents' appropriation unimpaired in quantity and quality, from its source in the State of California, down through the State of California towards respondents' point of diversion as far as the California State line.

2nd. Of the right to have the water of Walker River to the extent of respondents' appropriation flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondents' point of diversion.

3rd. Of the right to divert the water when it reaches the point of diversion.

Counsel's contention is that this right is one and wholly indivisible, and thus equally and wholly within each State and within the jurisdiction of the courts of both States.

Having in view the nature and character of a water right, let us assume that complainant should commence an action in a court of California to quiet its title to its rights to use the waters of Walker River in Nevada, and having obtained its decree in a court in California establishing its title to a specific right in the waters of Walker River, should take that decree and present it to a court sitting in Nevada, as evidence of its right to divert, free from interference, certain of the waters of the Walker River in Nevada. Would the decree of the California court be admissible in evidence, in so far as it purported to determine a right in the stream in the State of Nevada—real estate in the State of Nevada? Obviously not. While the court sitting in California would have unquestioned and complete jurisdiction to determine and establish the title to a right and interest in the Walker River in the State of California, it could have no jurisdiction to determine or establish any right or interest in the stream of the Walker River or other real estate in Nevada. That is an exclusive function of courts of the State of Nevada, and wholly beyond the jurisdiction of the courts of California or any other State.

This precise point was before the courts of Colorado and Utah in the cases of

Conant vs. Deep Creek Irr. Co., 23 Utah, 627; 66 Pac., 118.

Lampson vs. Vaile, 27 Col., 201; 61 Pac., 231.

The Conant case involved rights in a stream, Curlew Creek, flowing from Idaho into Utah. In an action in Idaho, in which all parties appeared, the Idaho court entered a decree purporting to quiet the titles of the parties in the stream in Utah as well as in Idaho. Later this action was commenced in Utah, the complaint being based on the decree of the Idaho court.

The court said:

"Did the Idaho court have jurisdiction to try and determine the title and right to the use of the water

flowing in that portion of Curlew Creek situated within Box Elder County, Utah?"

The question is conclusively answered in the negative, on the authority of *Carpenter vs. Strange*, 141 U. S., 105, and other cases hereinabove cited.

The court went on to point out that the courts of Idaho had jurisdiction to protect rights in the stream in Idaho, whether those rights in Idaho arose by virtue of a diversion from the stream in Idaho or from diversions made lower down the stream in Utah. To determine all rights in the stream in Idaho, was the exclusive function of the courts of Idaho, just as it was the exclusive function of the courts of Utah to determine all rights in the Utah portion of the stream.

From the foregoing, it is obvious that the Rickey Land & Cattle Company could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to its water rights in the State of California.

A judgment of a Nevada court, quieting title to real property in the State of California, would be a mere nullity. Yet complainants, in the original action, are simply turning the other side of the shield to the front, and bringing an action in the State of Nevada, in an attempt to quiet their title to a water right they claim in the State of California, because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondent, by virtue of its appropriation in Nevada, happens to have a right in this stream in Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change its point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to its right to have the water flow down the stream in California, a right to have the water flow down the stream and be di-

verted in the State of Nevada; but by so doing, petitioner could not vest the Nevada court with jurisdiction over its right to have the water flow down the stream in California. It is true that, after it changed its point of diversion down the stream and into the State of Nevada, the Nevada court could protect its right to have the water flow down the stream in the State of Nevada; but the Nevada court would have no more jurisdiction to protect the right to have the water flow down the stream in the State of California after it had changed its point of diversion into the State of Nevada, than when the point of diversion was in the State of California. *The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream, is exclusively in the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream, is exclusively within the jurisdiction of the Nevada court.*

Conceding, as we have, for the sake of the present argument, that the rights acquired by complainants are as great and extensive as they would have been, were the Walker River wholly an intrastate stream instead of an interstate stream; complainants' rights in the Walker River are real property, lying partly in one State and partly in another—partly in the State and district of Nevada and partly in the State and district of California.

Any construction of the law, that would vest in the Federal courts sitting in these respective States, concurrent jurisdiction over this entire property would be directly in the teeth of section 742, Revised Statutes, and section 8 of the Judiciary Act, which expressly limit the concurrent jurisdiction of United States courts over property lying partly in one district and partly in another, to property lying in districts "WITHIN THE SAME STATE." The words "WITHIN THE SAME STATE" and "BUT WITHIN THE SAME STATE" being words of positive limitation.

Take those words out of the statute, and the statute would

be broad enough to include property, lying partly in one district in one State, and partly in another district in another State, but the words "WITHIN THE SAME STATE" and the words "BUT WITHIN THE SAME STATE" place a positive and definite limitation on the jurisdiction of the court, which the courts have no power to go beyond.

Any construction that would give a court sitting in one State jurisdiction over this entire interstate property as fully as if the said property "were wholly within the district for which such court is constituted" would simply wipe out the plain words of the statute.

Counsel, with simply an abstract conception, a pure fiction, which he chose to term an *indivisible res*, a fiction referred to or described nowhere in either books or decisions, would wipe out these positive and clear words of limitation expressed in this statute, which confine the concurrent jurisdiction of courts over property lying partly within one district and partly within another, to property lying "WITHIN THE SAME STATE."

As noted above, there is no authority in law giving, and there is positive enactment of the law withholding from courts of different States, concurrent jurisdiction over the same subject-matter in a local action. There is nothing more indivisible about a stream, than there is about a piece of land, a wagon road or telegraph line, or a railroad lying partially in one State and partially in another State. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagon road or telegraph line or a railroad contemplate a movement in both directions along the way. But this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or *vice versa*, if an *indivisible res*, would be both wholly in the United States and wholly in British Columbia.

But the question of the indivisible nature of a stream, and the concurrent jurisdiction of courts of different States

thereover, is a question, closed equally by a decision of this court and the statutes. It came before this court in the case of *The Miss. & Mo. R. R. Co. vs. Ward*, 67 U. S., 485.

The action was commenced in the United States Circuit Court for the District of Iowa, for a mandatory injunction, to enjoin the maintenance of a bridge across the Mississippi river, from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation, and thus interfered with the plaintiffs' right to navigate the stream.

It will be observed, that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi river; and thus one-half of the stream and one-half of the bridge only, were within the territorial limits of the jurisdiction of the United States Circuit Court for the District of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the District of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But this court did not view either the bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream. This court held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and that that court could neither inquire into, nor adjudicate, concerning rights in the stream, or the effect of the bridge on the Illinois side; although it affirmatively appeared that one of the piers on the Illinois side created in eddy that obstructed navigation on the Iowa side of the river.

The absolute and definite limitation of the power of the United States Circuit Court for the District of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect

of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

"This is a question which we cannot examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi, by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice cannot do it, unless authorized by act of Congress."

Mr. Justice Nelson, while dissenting from the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

"The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court, for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court of the Iowa district cannot deal with it on the Illinois side; and for the same reason a court in the Illinois district could not, if the suit were in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a bridge, and it is

no longer a bridge; and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the court held that the stream and its eddies was as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended, as distinguishing this case, that, this action being in the nature of one to abate a nuisance by virtue of a mandatory injunction, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject-matter—the power of the court to act on the res.*

Counsel cited in the court below the cases *Lower King's River Ditch Co. vs. King's River & Fresno Canal Co.*, 60 Cal., 410, and *Desert Irrigation Co. vs. McIntyre*, 16 Utah, 398, 52 Pac., 628.

As to those actions, it suffices to say, the California constitution provides article 6, section 5, "That all actions for the recovery of the possession of or quieting the title to, or the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action is situated."

Section 3193 compiled laws of Utah, 1888 provides "Where real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

Under these plain provisions of the law, the courts readily and correctly held that the courts of either the upper or the lower county had jurisdiction to protect a right in a stream which had been acquired by a diversion and user in the lower county, but which has been trespassed upon in the upper county—both counties being within the same State.

In the Utah case there was a contention that the statute conflicted with the constitution; but the court held the constitutional provision sufficiently broad to authorize the statute.

The same court cited the Desert Irrigation Company case and construing these same constitutional and statutory provisions in the case of Postal Telegraph Company *vs.* Oregon S. L. Ry. Co., 23 Utah, 474, held, that a court sitting in one county had jurisdiction to condemn a right of way for a telegraph line through five counties, the line being in part in the county where court was sitting.

Would counsel have temerity to cite this case as an authority for the jurisdiction of a Federal court sitting in one State to entertain a suit to condemn a right of way over land situated in another State?

The decision of the Circuit Court of Appeals in this action, seems to have been made to turn on a definition of the nature, location and character of complainant's water right. The reasoning of that learned court seems to be, that the water right was part and parcel of complainant's land, from which it is deduced that the suit is, "One concerning or pertaining to that realty" (Transcript, 44, folio 98). To this construction with which we do not at all agree, we have no necessary dissent; for as above pointed out, as the subject-matter of our actions is real property situate exclusively in California, we could by no possibility present the same issues, as are presented in an action having as its subject-matter, realty situated exclusively in Nevada.

This point was entirely over-looked by the court below. The reasoning of that court established in the Federal Circuit Court sitting in Nevada, jurisdiction over a certain subject matter, namely realty in Nevada, from which the court concludes that the suit, "was properly instituted in the State of Nevada (Transcript, page 44, folio 98). It is unnecessary for us to deny that the court of Nevada had jurisdiction over

all realty in Nevada. That may be admitted and as long as we do not bring any suits which have as their subject-matter realty in Nevada there can be no conflict.

From another point of view the Court of Appeals lays stress on the fact that respondent's water right is an easement appurtenant to certain lands, "realty" which lie in Nevada, and, speaking of the right of easement, says "it savors of, and is part of, the realty itself," and thus the suit is "one concerning or pertaining to that realty," from which the deduction is made that the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception is that an easement must of necessity have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement, to which they are appurtenant. As was said by the way of illustration by Justice Woodbury in the leading case of *Stillman vs. The White Rock Mfg. Co.*, 23 Federal Cases, 83, No. 13446, in speaking of a water right in an interstate stream:

"Thus a right of way on land in one state to a farm in another is an interest situated in the first State, and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical to their locality. Nature fixes the locality of each, and one may be in one town, county, or state, and the other as well be beyond the dividing line in another, though contiguous and a suit lie in another for the injury committed there."

See also,

Bannigan vs. City of Worcester, 30 Fed., 294.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court, simply because it happened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell *vs.* Johnson, *supra*.

Morris *vs.* Bean, *supra*.

Hoag *vs.* Eaton, *supra*.

Anderson *vs.* Bassman, *supra*.

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which rights were appurtenant to land in the lower State. If water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject-matter within the jurisdiction of the court.

It is true that the subject-matter of these actions in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California; but that dependency does not make them one and the same as above noted. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California, may diminish respondent's rights in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondent's rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondent's rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream, as an easement right up to the

source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondent's right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondent must have protection, irrespective of whether it desires to divert the water from the California or the Nevada portion of the stream. If respondent can protect its rights in the stream in California, then it may receive the amount of water it is entitled to and desires to divert in the State of Nevada at the State line dividing the two States. Respondent's rights directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondent may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondent, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California; then, beyond question, its rights in the stream are in the State of California and beyond the jurisdiction of the Nevada court.

Conant *vs.* Deep Creek Irr. Co., *supra*.

Then let respondent change its point of diversion and use down the stream onto lands in the State of Nevada. By so doing, has it lost its right in the stream in the State of California? Or has it not the very same rights in the stream in the State of California that it had before it changed its place of use? We respectfully submit it has. It has lost no rights in the stream in the State of California, by changing its point of diversion and use to a point lower down on the stream and in the State of Nevada; and it can at any time change its point of diversion and use back up the stream and into the

State of California. In addition to cases hereinbefore cited,
see

Hargrave *vs.* Cook, 108 Cal., 80;

Kidd *vs.* Laird, 15 Cal., 180;

Davis *vs.* Gale, 32 Cal., 26.

By changing its point of diversion and use from the State of California, to a place lower down on the stream and in the State of Nevada, respondent may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that it did not have when it diverted all the water it was entitled to in the State of California; but the acquisition of such new right to have the water flow down the stream in the State of Nevada, that would result from the changing of its point of diversion and use from a place up the stream and in the State of California, to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there, just as much as they ever were; and any action having as its subject-matter, rights in the stream in California, might affect these rights; but the rights affected would be just as much in the State of California, in the case supposed, after the point of diversion and place of use had been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection; but if he desires to appropriate the water in the State of Nevada, the courts of California cannot protect his right to have the water flow down the stream in the Nevada portion of the stream. For his protection and the establishment of these latter rights he must go into the courts of Ne-

vada, which are the only courts having jurisdiction thereof.

Just as the courts of California cannot protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada cannot protect the appropriator's rights to have the water flow down the stream through the State of California. If it is the right to have the water flow on uninterrupted down the stream through the State of California that is involved, appellee must go to the courts of the State of California for protection; and the fact that as a result of the invasion of their rights in the stream in California, they have less water to divert from the stream in Nevada, does not change the location of the rights to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of *Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, page 83. In this case, a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject-matter of the action was put in issue. The court made it clear that the rights involved in that action were in the stream in Rhode Island; pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result consequential injury to complainant in Connecticut; but the direct injury and the rights directly involved were located in the State of Rhode Island. The court quite extensively

discussed the questions there involved in the following language:

"Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tendency in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interest in the whole stream is injured, and an action of some kind or other must lie for redress

somewhere. Ang. Water Courses, page 11, section 3, the cases there cited; Webb vs. Portland Mfg. Co. (Case #17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the lands and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong. *The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land, situated on one of the banks or to merely that half of the stream which is contiguous. Such interests may exist in water and its use.* 2 N. H., 259.

"The first and direct injury, then, is to the easement and consequent right existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Cook, 62.

"The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the center of the river or no interests to be protected there." (Italics ours.)

See also,

Bannigan vs. City of Worcester, 30 Fed., 294.

We respectfully submit, that the foregoing discussion has covered, in a substantial manner, every point raised by counsel or referred to in the opinions of the courts below. The opinion of the Circuit Court of Appeals was examined and discussed in detail in our brief in support of the petition for the writ of certiorari, which argument we will not repeat here, but for a further and more detailed discussion of the opinion of the court below, we respectfully refer to our brief in support of the writ, on file herein.

As a final clarifying thought let us suppose that Miller & Lux in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject-matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California, would have as its subject-matter, the protection of rights in the stream in the State of California. By virtue of the two actions Miller & Lux would establish and protect its entire rights in the stream, in California, as well as in Nevada; but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO, THIS COURT MUST HOLD THAT THE SUBJECT-MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against Thomas B. Rickey, on June 10th, 1902. On August 6th, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is

here enjoined, were brought by the Rickey Land and Cattle Company. For the doctrine of *Lis Pendens* to apply, there must be a transfer of a *res* which is the subject-matter of an action pending.

Black on Judgment, section 550.

Freeman on Judgments, sections 196-197.

For the doctrine of *Lis Pendens* to apply the *res* must be within the territorial jurisdiction of the court.

Carl *vs.* Lewis Coal Co., 96 Mo., 149.

Sheldon *vs.* Johnson, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company, was situate wholly in the State of California, and thus wholly outside the territorial limits of the jurisdiction of the Nevada Court, and thus the *res* transferred could not be the subject-matter of the bill filed by the respondent in that action. Yet the *res* transferred was the subject-matter of the action in the California suits; and thus it follows that there is no room for the application for the doctrine of *Lis Pendens* by which it is sought to connect petitioner herein with the original action of Miller & Lux *vs.* Rickey et al.

On the other theory of the case, namely, that the action of Miller & Lux *vs.* Rickey, is a transitory action *in personam* against Thomas B. Rickey in which to use the language of Judge Hawley on the plea "the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction," and thus within the jurisdiction of the circuit court sitting in Nevada; an equally impassable obstacle exists to the maintenance of this action against the Rickey Land and Cattle Company, as the successor in interest of T. B. Rickey. Considering that action as transitory, and as having for its purpose, a decree directed against the person of Mr. Rickey, then the case can, in no way affect this petitioner as a purchaser from Mr. Rickey.

Thus Kerr on Injunctions, page 7, lays down the rule:

"Injunction being an order directed to the person it does not run with the land."

It will be determinative as to the title of the plaintiff but not determinative as to any property of the defendant.

See,

Attorney General *vs.* Birmingham, 50 L. J. Ch., 786; 17 L. R. Ch. Div., 685.

The city Board of Trustees was enjoined from polluting a stream with sewerage; the sewerage went from the river and onto the property of the complainant. Subsequently the town of Birmingham re-incorporated, and the drainage works were by deed transferred to the new corporation. It was sought to make the injunction effective against the Board of Directors of the new corporation. The court said:

"The first observation to be made is with respect to this injunction to re-train the continuance of a tort. It is an injunction merely against the counsel, their workmen and agents, that cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard in such a case, of the new owner or purchaser of the land being liable to the former decree. If he continues the nuisance, or commits a fresh nuisance, you can bring an action against him, and that is all. He has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree, nor, I believe, was such a thing ever heard of before."

Beech on Injunctions, section 3, thus lays down the rule:

"An injunction being *in personam* should not be granted against the executors on account of acts done by the testator."

Kirk *vs.* Todd, 21 L. R. Ch. Div., 487.

St. Helena Water Co. *vs.* Forbes, 62 Cal., 182.

In this last case the courts speaking of the rights of an assignee said:

"It is sufficient to say that the present plaintiff was not a party to the suit in which the injunction was awarded."

These authorities are all cases where the subject-matter was property situate within the jurisdiction of the court, whereas in our case the property transferred was in another State.

If this petitioner is and can in no way be bound as a successor in interest of T. B. Rickey by the litigation in the case of Miller & Lux *vs.* Rickey, then it clearly follows that in no action that may be prosecuted between petitioner and Miller & Lux, can the litigation pending between Miller & Lux and T. B. Rickey be in any manner affected.

The theory on which the decree herein was rendered, is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles, to an interest in a stream flowing in the State of California, the necessary ultimate result will be unseemly conflicts between courts. In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada, the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable, that their decisions will be in conflict with the decisions of the California courts, on the rights in the stream in California, and there will insue nothing but unseemly conflicts between courts.

But let the law be as we here contend; let the Nevada appropriator have recourse to the courts of Nevada to protect his rights in the stream in Nevada and to the courts of the State of California, State or Federal, to protect his rights in

the stream in the State of California, and all will be harmonious and without conflict.

To sum up—we have seen that if the action of Miller & Lux *vs.* Thos. B. Rickey be regarded as a local action, having for its subject-matter real property and presenting issues as to the title to real property, such real property must be located exclusively within the State of Nevada; and thus by no possibility could the issues presented in that action, be presented in an action commenced in the courts of the State of California, to quiet a title to property in California.

On the other hand, if we adopt the conception contended for by complainant and announced by Judge Hawley, but which we believe to be in the teeth of all the authorities, that the action of Miller & Lux *vs.* Thos. B. Rickey is a transitory action *in personam* in which the "relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction" then it becomes impossible, for another person, the Rickey Land and Cattle Company, to interfere with the jurisdiction of the said Circuit Court for the District of Nevada by any action it might commence in any court.

Wherefore we respectfully submit, that the actions commenced by petitioner in California did not, and could not present the same issues, as were tendered by the actions commenced by Miller & Lux against Thomas B. Rickey in Nevada, for the simple reason that the court sitting in Nevada had no jurisdiction to try any issue tendered in the California action or *vice versa*.

Respectfully submitted,

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Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 4.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,
against
MILLER AND LUX, RESPONDENT.

No. 5.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,
against
HENRY O. WOOD, JAMES O. BIRMINGHAM,
CHARLES SNYDER, AND CHARLES JOHNSON,
RESPONDENTS.

ADDITIONAL BRIEF FOR PETITIONER.

After further consideration of the principles announced in *Kansas vs. Colorado*, 206 U. S., 47, we deem it advisable to present this brief, in addition to the very full citation of authorities which was filed with the petitions and the briefs filed at the last term of this court.

In order to affirm the decision of the Court of Appeals herein, this court must decide that the Circuit Court of the District of Nevada, of which State defendant Rickey is a citizen, has, in a suit in equity against him, commenced by Miller and Lux, a citizen of California, jurisdiction of such a nature, *in personam*, as to authorize such Circuit Court to inquire into and determine the rights of Rickey, at the time the suit was filed, to the waters of the Walker River, in California, and to command the quantity and times of the use of such water in the State of California by the successor, by grant, of said defendant, Thomas B. Rickey.

We insist that the question here presented is primarily between the State of Nevada and the State of California, as to how much of the water of the Walker River each State has sovereign control of.

The common source of title of all who divert and use the water in California is the State of California. The common source of title of all who divert and use the water in Nevada is the State of Nevada.

There is no such thing as a prior right acquired to use the water under either State, which is prior in both. The prior rights alleged by Rickey Land and Cattle Company in California, and the prior rights of Miller and Lux in the State of Nevada, may both exist as to the water claimed by each.

As to what quantity of water this prior right of the Rickey Land and Cattle Company or the riparian right of the Rickey Land and Cattle Company, in California, attaches, so far as concerns Miller and Lux, will depend upon the determination of the other question, How much water has the State of California, as against Nevada, the right to control?

In disposing of the rights of private corporations parties to the action in *Kansas vs. Colorado*, this court said:

"While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails, it fails also as against them."

It was also decided in this last-named case that each State "has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

Again it was said in this last-named case:

"One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet whenever, as in the case of *Missouri vs. Illinois*, 180 U. S., 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."

The authority and power of States admitted into the Union to control and dispose of the waters of the streams, announced in *Kansas vs. Colorado*, is directly at variance with the principles announced in cases of *Howell vs. Johnson*, 89 Fed., 559; *Morris vs. Bean*, 123 Fed., 618; *Hoag vs. Eaton*, 135 Fed., 411; *Anderson vs. Bassman*, 140 Fed., 14, and with certain State courts which follow them, also the decision of this case in the Court of Appeals. The underlying conception in all these cases is that because of congressional legislation concerning the waters of streams in the then Territories of the United States, and because of certain natural laws, that the sovereignty of the States carved from these Territories was a limited or qualified one as to

the waters of such streams. In this case the Court of Appeals, disregarding the rights of riparian owners, recognized by the laws of the State of California, said that the relative rights of the parties in each State were to be finally determined according to the laws of prior appropriation along the entire course of the stream. So far as the conclusions of these courts were based upon such a conception of State sovereignty, they were expressly overruled by *Kansas vs. Colorado*. At page 95 Justice Brewer, for this court, says:

"In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. * * * When the States of Kansas and Colorado were admitted into the Union, they were admitted with the full powers of local sovereignty, which belonged to other States. *Pollard vs. Hagan, supra*; *Shively vs. Bowlby, supra*; *Hardin vs. Shedd*, 190 U. S., 508, 519; and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purpose of irrigation. Now, the question arises between two States, one recognizing generally the common-law rule of riparian rights, and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other."

Again on the same general subject:

"It may determine for itself whether the common-law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any State."

The cases alluded to that held a divided sovereignty following and meandering with the waters of the stream, a kind of co-ownership sovereignty, are all at variance with the principles of *Kansas vs. Colorado*.

From the decision in *Kansas vs. Colorado*, it is plain that the source of the right to divert and use the waters of streams in California is the law of the State of California; equally is the source of the right to divert and use the waters of streams in Nevada the law of Nevada. This excludes, under all circumstances, a common source of title for persons enjoying the use in the two States. California cannot rightfully bestow the use of that part of the stream which, as between California and Nevada, is within the sovereign disposition of Nevada, nor can Nevada bestow the use of water which California has a right to bestow as between California and Nevada. The policies of each State can, therefore, determine the relative rights and priorities of persons only as to such part of the stream as comes within its territory. As between the two States there can be no question of priority. The only question between them is, What part of the whole can each rightfully grant the use of? The answer to this question for California determines the rights of Nevada also, because those rights can only be to the residue.

The subject-matter of the claim to the use of water by complainant and by the Rickey Land and Cattle Co. resolves itself into a question of what are the rights of California and of Nevada to the stream.

Next approach the question of priority of the complainant as alleged. We have in California the law of riparian rights, which excludes any right of an appropriator in the absence of a prescriptive adverse use. We also have in California, as between appropriators, the priority of right, based upon time of appropriation and use. In Nevada we have the law of appropriation and use, with priority to him who first uses and appropriates. The priority acquired under the laws of Nevada cannot be to that part of the stream which it is the sovereign right of California to bestow, nor can priority acquired under the laws of the State of California

be to that part of the water which Nevada had a right to bestow.

In this next step, concerning the inquiry into priority, we are confronted with the question of the relative rights to the stream of California and of Nevada.

Furthermore, does not the inquiry, as between Rickey, in California, and Miller and Lux, in Nevada, end by the determination of the same question, viz., what are the rights of California to bestow, thereby also determine what are the rights of Nevada to bestow?

The defendant Rickey disclaimed all rights to use or interfere with the water in Nevada and asserted his rights to a definite quantity in California. Rickey, disclaiming any right in Nevada, cannot be heard to question the claim to water by Miller and Lux in Nevada, under the laws of Nevada. The claim of Miller and Lux may exceed the entire flow of water which reaches Nevada. The fact of an excessive claim by a person under the laws of Nevada to something which Nevada never had to bestow, would not authorize a person asserting no claim under the laws of Nevada, to have the excessive claim determined. If possibly a trial were had, it would end when the water that Nevada had a right to have flow down was adjudged. It would not proceed further at the instance of one making no claim thereto, to adjudicate the claim of Miller and Lux.

The claims of persons to the use of water in California, which that State can authorize the use of, cannot be questioned by claimants to water in the same stream, under the laws of Nevada. It is immaterial to such users in Nevada who uses in California, so long as it is within the power of California to bestow the use.

Before, therefore, the Circuit Court could grant the prayer for injunction in the original action, it must determine, not what are the rights of the defendant Rickey, or any other person in California, but what are the rights of the State of California to bestow, by her laws. The inquiry under the

facts alleged, as between the defendant, T. B. Rickey, and Miller and Lux, in the original suit, is therefore one which begins and ends at a determination of the rights of Nevada and of California to the waters of the Walker River.

Here again let me call the court's attention to the peculiar nature of the question to be inquired into in the original suit. It is not that Rickey is making any use of his property in California which is injurious to health, or to comfort, or that is an offensive nuisance to be restrained because of the limitation on the use by the owners of all property, that is, to so use his own as not to interfere or destroy the use by others of their property. The use complained of by Rickey, in California, is the same identical use Miller and Lux claim the right to make in Nevada. Both uses consume the water. So that the inquiry presented to the Circuit Court, regarding the use by Rickey in California, is not as to the lawfulness of the manner of that use, but solely is addressed to the quantity used.

Certainly Miller and Lux, claiming under the State of Nevada, can make no claim against Rickey, that the State of Nevada could not have made, yet that State could only have been heard as to that part of the waters of the stream which was not within the power of California to bestow, as these were the waters in which Nevada was interested.

The question of the respective rights to the waters of the Walker River of the States of California and Nevada, if disputed by the States themselves, can be adjudicated by this court under its grant of original jurisdiction.

Kansas *vs.* Colorado, *supra*.

These rights may be settled between the States by compact or agreement, by congressional sanction under section 10 of Article 1 of the Constitution.

Kansas *vs.* Colorado, 185 U. S., 139.

2 Story on Constitution, §§ 1402, 1403.

Has a Circuit Court of the United States jurisdiction to determine the question of the respective rights of Nevada and California to the waters of the Walker River at the instance of private litigants? That the question was of such a nature that the United States Supreme Court could determine it when the States invoked the jurisdiction of that Court, was decided in *Kansas vs. Colorado, supra*. The question here is can such judicial action be invoked in any court by any litigants other than a State.

A decision at the instance of private parties could not bind the States not parties to the record. The judgment, however, of the Circuit Court, if it has jurisdiction, would be final between the parties. Every body not a party to it would be free to act. If the Circuit Court has jurisdiction then the greatest confusion will result, if the States, after decision by such court, undertake to have the rights to the waters of the stream determined between them. Nor is this speculation remote. Such a condition might have been presented in *Kansas vs. Colorado*.

Will such prior decisions of the Circuit Court be persuasive to this court? Will these decisions and the physical and commercial conditions they have forced to grow up under them, be taken into consideration in finally determining the rights of the States? In *Kansas vs. Colorado*, this court gave consideration to the evidence of the material and commercial changes that had been made by the laws and decisions of the courts of the two States. By decisions of the Circuit Court directly deciding at the instance of private parties the rights of the two States, the Circuit Court would be forcing the evidence upon which the final issue was to be determined by this court.

If a decision is rendered by the Circuit Court in which it determines, at the instance of private parties, the rights of the two States to the stream, and upon a trial at the instance of the two States this court determines upon another apportionment, nothing but confusion could result.

Such a determination assumes that one State has received more and the other less than the decision between the private parties. In case the decision of this court gave more to the upper State the judgment of the Circuit Court would bind one citizen, at least, so that he could not avail himself of any part of the excess, while all others would be at liberty to do so. Let us assume that the decision of this court gives less to a State than is taken for her portion in the decision of the Circuit Court, then how is the rebating of water to be made by those who are parties to the final judgment of the Circuit Court. The final judgment of the Circuit Court cannot be made to yield to new conditions. That would be to destroy its character as a final judgment.

The considerations of expediency argue that the determination of the questions of the rights of a State to the absolute, unrestricted control and use of the waters within its boundaries cannot be litigated before any court in any proceeding at the instance of private parties, and can only be litigated in the Supreme Court of the United States at the instance of the States interested.

In *Georgia vs. Tennessee Copper Co.*, 206 U. S., 337, Justice Holmes, speaking for this court, says:

"When the States, by their union, made the forcible abatement of outside nuisances impossible to each * * * they did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests, and the alternative to force is a suit in this court."

And Chief Justice Fuller in *Kansas vs. Colorado*, 185 U. S., 139, speaking for this court, says:

"The original jurisdiction of this court over controversies between two or more States was declared by the judiciary act of 1789 to be exclusive, *as in its nature it necessarily must be.*" (Italics ours.)

The individual rights of many private citizens to be protected by the State, not the interest of the State as the owner

of property directly affected, was the basis of the jurisdiction as stated by this court in—

Georgia *vs.* Tennessee Copper Company, 206 U. S., 337.

Missouri *vs.* Illinois, 180 U. S., —.

The door is open to have the respective rights of the States determined by this court. If the State of Nevada suffers from diversions of water in California it is the privilege of Nevada to commence a suit in the United States Supreme Court to limit such diversions.

Until the interest is of sufficient importance to warrant the State of Nevada to make the issue, can any court at the instance of private parties try it?

So long as the respective States do not dispute in the United States Supreme Court, no private party can be heard in any other court to determine the rights of the two States.

The right of the upper State to take all the water is not controlled by any laws of the stream or rights directly connected with it. In *Kansas vs. Colorado*, the scope of inquiry to determine the rights in the stream was stated by Justice Brewer:

“We are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which, by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, *although not in the Arkansas Valley*, a benefit from water as

great as that which would enure by keeping the flow in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed."

The very scope of inquiry as thus outlined discloses that it is of sovereign character, and the inquiry in no sense between private litigants.

How States shall exercise the powers entrusted to them as sovereignties, is a question of sovereignty not of property.

Nevada has no property rights in the streams of California. There is no qualified sovereignty in the streams of California which flow into Nevada. The sovereignty of California is as full and ample over this part of her territory as it is over any other. She may, by relation of the States of the Union, owe Nevada a duty regarding the use of the waters of this stream, not because of a divided sovereignty in California, but because a State should so compel the use of its territory as not to destroy the use of the water by the neighboring State. This is a limitation directed to its conduct as a State with reference to the use it permits of the stream. What Nevada has a right to insist upon from California is a course of conduct with reference to this particular part of the territory of the State of California. Nevada has no right to insist upon a qualified ownership of any of the territory of California, be it water or land. What must be the rule of conduct before the States act?

It being a question of sovereignty, and no dispute existing between the sovereign States, the State courts must treat all within the territory of California as belonging to California, and all within Nevada as belonging to Nevada. In such courts the lines of the States' boundaries are to conclusively determine the States' rights. Nature's laws and the advantages that each State may have from them are not to be questioned by these courts. The boundaries of the States,

as to these courts, are the fixed monuments of authority to all the waters within. Such was evidently the view of Justice Holmes when, as justice of the Supreme Court of Massachusetts, he said, in *Manville Co. vs. Worcester*, 138 Mass., 89:

"Of course the laws of Rhode Island cannot subject Massachusetts lands to a servitude, and apart from any constitutional conditions, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes, so it might authorize any act to be done within its limits however injurious to lands or persons outside them."

If the Circuit Court of Nevada had jurisdiction *in personam*, over the defendant, T. B. Rickey, so that it could inquire into the rights to use the water in California, the decree could in no way affect the title to water in the State of California, and would, therefore, be in no manner binding upon the Rickey Land and Cattle Company, the grantee of the defendant, T. B. Rickey. The proceeding in Mono County will proceed to determine the title of the Rickey Land and Cattle Company in California, and the Circuit Court enjoin T. B. Rickey from trespassing upon the stream without conflict of jurisdiction.

The jurisdiction *in personam*, to the most liberal extent claimed by respondent would still be *in personam*. It could never affect the title outside of the jurisdiction, so as to prevent purchasers of the property from maintaining suits to quiet the title.

Fall *vs.* Eastin, 215 U. S., 1.

Watkins *vs.* Holman, 16 Peters, 25, 57.

Corbett *vs.* Nutt, 10 Wall., 464.

Carpenter *vs.* Strange, 141 U. S., 87, 105.

In *Watkins vs. Holman*, this court said:

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may well enforce its decree by process

against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom title is vested, can operate beyond the jurisdiction of the court."

In *Fall vs. Eastin*, this court, speaking by Justice McKenna, said:

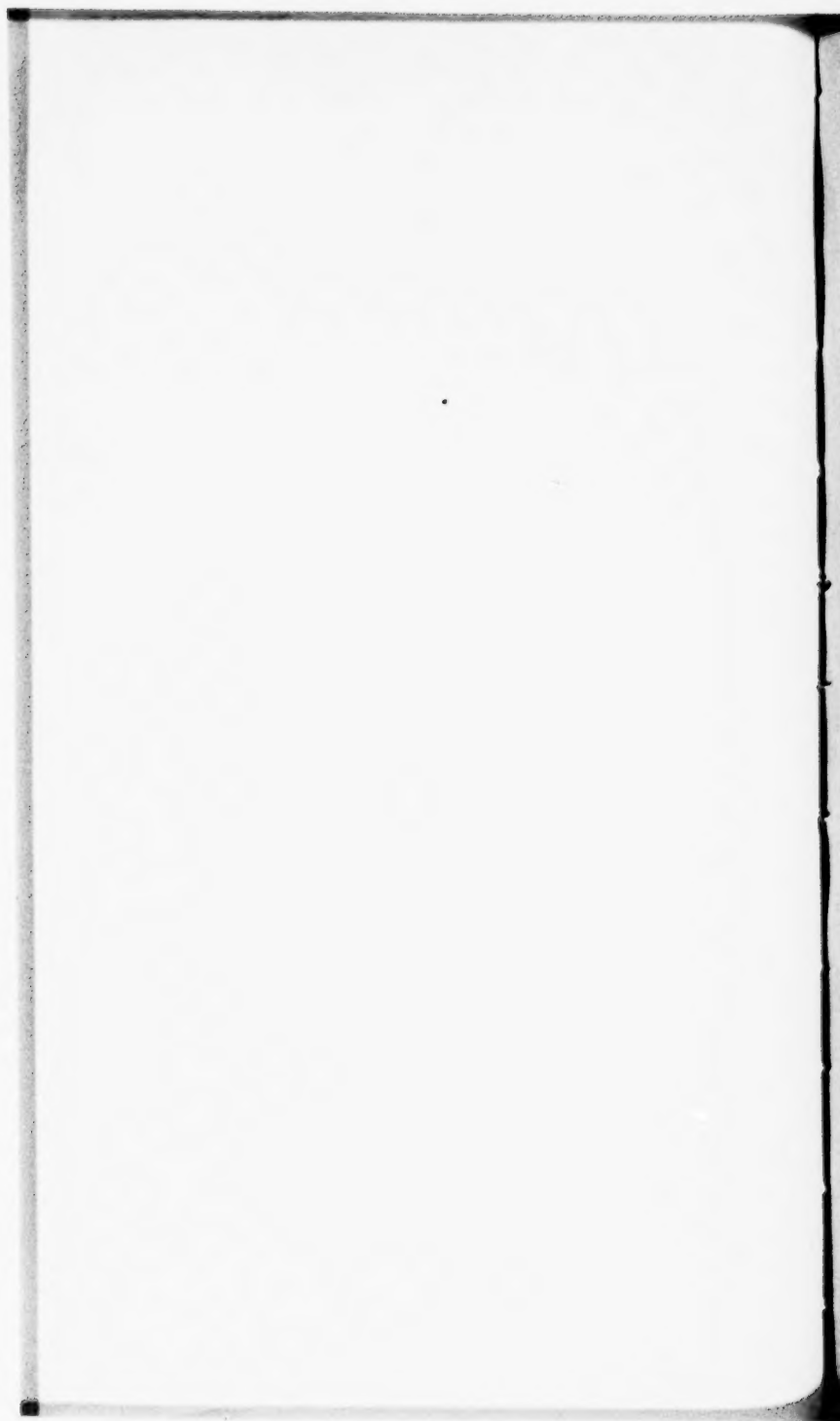
"But however plausible the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree is firmly established."

In the same case it is also stated:

"When the subject-matter of a suit in a court of equity is within another State or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. * * * On the other hand, where the suit is strictly local, the subject-matter is specific property and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the State where the subject-matter is situated. 3 Pomeroy's Equity, §§ 1317, 1318."

It is respectfully submitted that for these reasons, in addition to those given in other briefs on file, the decision of the Circuit Court of Appeals, Ninth District, should be reversed.

JAMES F. PECK,
Solicitor for Petitioner.



Office Supreme Court, U. S.
FILED.

JAN 12 1910

JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~100~~ 4

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER & LUX, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT ON MERITS.

W. B. TREADWELL,
Solicitor for Respondent.

ALDIS B. BROWNE,
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FRANK H. SHORT,
ISAAC FROHMAN,
EDWARD F. TREADWELL,
Of Counsel.

(21,049)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 89.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

MILLER & LUX, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT ON MERITS.

We have not been favored with petitioner's brief on the merits and therefore cannot certainly know what points petitioner will rely on in the argument. As, however, counsel for petitioner filed an elaborate brief in support of the petition herein for writ of certiorari, we shall assume that such brief sets out the positions he intends to take on this argument, and we shall here attempt to reply to that brief. Accordingly, any references here made to utterances of counsel for petitioner should be taken as referring to that brief.

Statement of Facts.

The respondent, Miller & Lux, a California corporation, filed in the United States Circuit Court for the District of

Nevada a bill in equity against Thomas B. Rickey and a large number of other persons, all citizens of Nevada and residents of that district, and process of subpoena was thereupon issued and served on said Rickey, and he thereafter entered his appearance and put in a plea to the jurisdiction, which was overruled, and thereupon he answered.

By that bill it was alleged that the complainant is seized and possessed of certain lands (in the bill particularly described) in the State of Nevada, which are riparian to a certain water-course called Walker River; that at divers times therein set forth it had acquired, by appropriation and use, the right to divert certain specified quantities of the waters of said river and to use the same for the irrigation of said lands; that the defendants, including said Rickey, had diverted and were threatening to continue to divert the waters of said river above the complainant's said lands and above where the complainant diverted the same, thus preventing the complainant from irrigating said lands and damaging it, and that said diversions by the defendants were without right, but were being made under claims of right and adversely to said complainant. The prayer was for an injunction to restrain such diversions and for general relief (Rec., pp. 2-3).

The record here does not show what was said Rickey's plea to the jurisdiction, but, in paragraph III of its petition for certiorari herein (pp. 3-4) petitioner assumes to set it out, and refers therefor to the opinion in *Miller & Lux v. Rickey*, 127 Fed., 573. According to that statement that plea was, in substance, that all the diversions ever made or intended to be made by Rickey from the Walker River were made wholly in the State of California and solely for use upon certain lands in that State.

The fact is that the Walker River rises in the State of California in two branches, called the East and West Forks, which flow into the State of Nevada and there unite—the lands of Miller & Lux being on the main stream in Nevada below the junction of those forks.

After the filing of that bill and after the service of the subpoena on Rickey, and after his appearance in said suit, he conveyed to the Rickey Land and Cattle Company, a Nevada corporation (the petitioner here), all the rights owned or claimed by him to any water of Walker River. Thereafter, and while that suit was still pending, said Rickey Land and Cattle Company commenced in the Superior Court of Mono County, California, two actions against Miller & Lux and a number of other persons, by filing complaints, in which it alleged and claimed a superior right to the waters of Walker River, and alleged the existence of adverse claims thereto by Miller & Lux and other persons, and prayed for a decree quieting its title to the waters of said river as against Miller & Lux and other persons.

Thereupon Miller & Lux commenced the present suit by an original bill *ancillary* to said suit of *Miller & Lux v. Rickey*. In its said bill it alleged the foregoing matters in detail (Rec., pp. 1-7), *also* (Rec., pp. 3-4), that Rickey himself caused the organization and incorporation of the Rickey Land and Cattle Company and was the only person really interested in it or owning any of its stock, and that the other stockholders therein were merely his nominees and held their stock solely for him, *also* (Rec., p. 7) that the only rights claimed by said Rickey Land and Cattle Company in or to any water of Walker River were such rights, if any, as it had acquired by said conveyance from Rickey, and that the issues tendered by the complaints in the actions so brought by it in the State court were, so far as Miller & Lux is concerned, the same issues as those tendered by the said bill of complaint in *Miller & Lux v. Rickey*, and that the necessary effect of said actions would be to bring on said issues for trial in said State court and thereby defeat the jurisdiction of the United States Circuit Court in said suit of *Miller & Lux v. Rickey*, and to hinder and embarrass said circuit court in the trial of said issues and in the enforcement of any decree which it might render in said suit. The bill (Rec., p. 8) prayed an injunction against the Rickey

Land and Cattle Company restraining it from further prosecuting said actions in the State court as against Miller & Lux.

Thereupon, on the application of the complainant in said suit (Miller & Lux), the circuit court made an order (Rec., pp. 9-10) requiring the Rickey Land and Cattle Company to show cause why an injunction *pendente lite* should not issue as prayed for in said bill, and accompanied that order with a temporary restraining order.

On the hearing of that order to show cause said defendant (the petitioner) filed certain affidavits (Rec., pp. 21-28) which, as we shall show, did not controvert any material allegation of the bill, and the application was heard on the bill and affidavits.

Thereupon (Rec., pp. 28-29) an injunction *pendente lite* was issued by Judge Hawley as so prayed for, and it is from that order that the appeal herein was taken to the Circuit Court of Appeals.

On that appeal the Circuit Court of Appeals affirmed that order, and thereafter this court, by request of both parties, granted this certiorari.

The ground principally relied on by petitioner in the Circuit Court of Appeals and in this Court for a reversal of the order is that the Circuit Court for the District of Nevada had no jurisdiction of the suit of *Miller & Lux v. Rickey* as against Thomas B. Rickey.

ARGUMENT.

As we understand it, the claims of petitioner herein are three, namely: (1) That the suit of *Miller & Lux v. Rickey* was a *local* suit, and that so far as it related to diversions from the river made by Rickey in California the *locality* is in California, and that therefore no Nevada court could have jurisdiction; (2) that there is no conflict between the actions in the State court and that suit, and the issues are not the same, and that therefore the injunction should not have

been issued, and (3) that there was in that suit no such *lis pendens* as to make a decree therein binding on the petitioner here.

As to those matters we contend:

I.

That the Circuit Court had complete jurisdiction against Rickey as to all matters in the suit of *Miller & Lux v. Rickey*, because:

1. If that suit be one of a local nature its proper locality was *Nevada*, where it was brought;
2. Irrespective of the question whether an action *at law* to redress the injuries complained of in *Miller & Lux v. Rickey* would or would not be considered to be local, a court of *equity* has jurisdiction to act *in personam* against a person within its jurisdiction, even as to acts committed without the territorial jurisdiction.

II.

The issues in the actions in the State court are issues in the suit of *Miller & Lux v. Rickey*, and those actions would materially interfere with that suit and impede and embarrass the circuit court in disposing of it.

III.

The "Rickey Land and Cattle Company" is but another name for Thomas B. Rickey; and even if that be not so, it was merely a purchaser *pendente lite* of the right relied upon by Rickey in that suit, and would be bound by a judgment therein.

I.

IN THE SUIT OF MILLER & LUX *v.* RICKEY THE CIRCUIT COURT FOR THE DISTRICT OF NEVADA HAD FULL JURISDICTION OVER THE DEFENDANT RICKEY, AND JURISDICTION TO

DETERMINE WHETHER OR NOT HE HAD ANY RIGHT SUPERIOR TO MILLER & LUX IN OR TO ANY WATER OF WALKER RIVER.

1. *If that suit be one of a local nature Nevada was a proper locus, and it was properly brought there.*

Although the acts of Congress as to the jurisdiction of circuit courts are silent on the subject, counsel for petitioner contends that the common-law distinction between local and transitory actions, and the consequences of that distinction, apply equally to the courts of the United States. With some modifications not necessary to mention at this point, we think that counsel is correct in that contention. But, if that be so, it must be equally true that, if an action in one of those courts is brought in a venue which would have been the proper one at common law, the court *has* jurisdiction so far as that matter is concerned.

At common law it was a well-established rule as to actions of a local nature that where there are several facts which together are necessary to make out the cause of action, the venue may properly be laid where *either* of those facts had its technical *locus*. Such a rule is unavoidable; for where the *loci* of those several facts happen to be different the action could not be brought *anywhere* unless the rule were so.

The leading case on that subject, always followed, is *Bulwer's Case*, 7 Coke, 1. There the court said:

"When matter in one county is depending upon a matter in another county, the plaintiff may choose in which county he will bring his action," and, "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage."

So, in *Comyn's Digest*, Tit. "Action," N. 11, it is said:

"When an action is founded on two things in different counties, both material to the maintenance

of the action, it may be brought in the one county or the other."

In 1 *Saunders' Pleading & Evidence*, 413, it is said:

"Where an injury has been committed in one county to real property situated in another, or whenever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either."

So, in *Scott v. Brest*, 2 T. R., 238, it was said:

"Supposing the foundation of the action to have arisen in two counties, I think that where there are two facts which are necessary to constitute the offense, the plaintiff may *ex necessitate*, lay the venue in either."

This rule has uniformly been followed in America.

Barden v. Crocker, 10 Pick., 383.

Pilgrim v. Mellor, 1 Ill. App., 448.

Oliphant v. Smith, 3 P. & W. (Pa.), 180.

Geuld, Pl., 105.

The rule is well stated and clearly illustrated in *Thayer v. Brooks*, 17 Ohio, 489, 492, wherein it appeared that plaintiff's mill was in Ohio and driven in part by a stream of water flowing from a swamp situated in Pennsylvania, and which swamp was in part upon land owned and possessed by defendant, who had cut a ditch across his farm in Pennsylvania, by which the water was diverted from plaintiff's mill. The action was in case, and in sustaining the jurisdiction of the lower court the Supreme Court of Ohio said:

"The act was done in Pennsylvania, the injury which was occasioned by that act was sustained in Ohio. In such a case it is believed the suit would well lie in either State. When an injury has been caused by an act done in one county to land situated in another, the venue may be had in either. Chitty, Pl., 299, and cases referred to."

What, then, was the cause of action sued on in *Miller & Lux v. Rickey*? The complainant alleged *two property rights*: (1) the right to have flow to it in Nevada the waters of Walker River, that it might divert them for irrigation in Nevada; (2) the right to have the waters of that river flow to certain particular lands in Nevada belonging to it to irrigate those lands; *a wrongful injury*, the diversion of the waters of the river, above complainant's lands and ditches, thus preventing the water from reaching plaintiff or its lands; *and a damage*, the loss of the water generally, and particularly the drying up of the lands in Nevada, and the consequent failure of crops for want of water.

Rickey in his plea alleged that his *acts* of diversion were all committed in California, and he sought to justify them on the ground of his alleged ownership of certain riparian lands in California.

Assuming that plea to be true, we see, then, that complainant's property rights and the damage to those rights were both in Nevada, while the wrongful acts *causing* the injury were committed in California. Under the rule we have stated it therefore follows that the action might have been brought, so far as this question is concerned, either in California or Nevada, and it was therefore properly brought in Nevada.

The *land* for which complainant seeks protection is situated wholly in Nevada, and although the river in question flows in both States the *water right* which complainant claims is the right to have that water *in Nevada*. That right, as counsel admits, is property, and real property. The *property*, then, as to which complainant alleges a right, or which it seeks to protect from injury, is situated in Nevada.

The same is true as to the *injury* alleged. It consists solely in preventing the water from flowing, *in Nevada*, to the complainant's lands and ditches *in that state*.

So as to the relief sought. All that the complainant asks is that the defendant be compelled to abstain from prevent-

ing the water from flowing *in Nevada* to certain points *in Nevada*—and it therefore relates only to a matter personal to the defendant, and either having no legal *situs* or having its *situs* in Nevada.

The suit, therefore, is strictly one for injuries to real property *in Nevada*, and the universal rule is that such a suit may be brought in the courts of the State where the property is situated or where the injury is inflicted, at the option of the complainant.

Taylor v. Cole, 3 T. R., 292.

Doulson v. Matthews, 4 T. R., 503.

Livingston v. Jefferson, Fed. Cas. 8411.

The fact that the physical act which *causes* the injury is done in another State does not, for the reason above stated, affect the case. Suppose that I own a house in Nevada, near the California line, and a citizen of Nevada goes into California, sets up there a cannon, and shoots balls against the house to its injury. If I find him in Nevada, can I not sue him *there* for damages for that injury, or *there* enjoin him from continuing such acts? This case cannot be distinguished from such an one.

It is to be noticed that counsel for petitioner has not cited a single case to the contrary. He has referred to many cases as to the local jurisdiction of an action *to abate a nuisance*; but that question is a very different one from that here involved. Owing to the looseness and generality of the legal terms employed, the same thing may sometimes be considered in one point of view as a nuisance, and in another point of view merely as a trespass. But though that is true, it is certain that "to abate a nuisance" in this connection means to remove or destroy or disable some specific, tangible, physical thing whose situation or operation, or mere existence, causes a wrong; and those words mean nothing else. Every case cited by counsel is either avowedly or on its facts one of that kind. In such an action the venue must be in

The right of complainant is the right to divert a certain quantity of water for the irrigation of certain lands in Nevada, and the existence of that right is the only issue in that case. Where, then, is the *situs* of that right? Is it a mere floating right, with no definite location? Is it personal property following the owner, or is it real estate appurtenant to land in Nevada? The decisions show such a right to be clearly of the latter character.

"Water-courses are either natural or artificial. Plaintiff's ditch was an artificial water-course. 'A water-course consists of bed, bank and water.' (Angell on Water-courses, sec. 4.) The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its water-course. Granting that plaintiff does not own the *corpus* of the water until it shall enter the ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of lands, that which is affixed to land, and that which is incidental, or appurtenant to land. (Civil Code, 658.) If the water-course, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto."

Lower Kings River W. D. Co. v. Kings River & F. C. Co., 60 Cal., 408.

See also:

Standard v. Round Valley, 77 Cal., 399.

Hayes v. Fine, 91 Cal., 391, 398.

Last Chance, etc., Co. v. Emigrant, etc., Co., 129 Cal., 277.

Lorich Tule, etc., Co. v. King, 144 Cal., 450.

Smith v. Deuniff, 24 Mont., 25.

Accordingly the jurisdiction in a case of such a nature, in a court of the State or county *into* which the stream flows and in which the land or ditch injured is situated, has

been sustained as against one making a diversion in a State or county above in the following cases:

Willey v. Decker (Wyo.), 73 Pac., 210, 223.

Deseret Irr. Co. v. McIntyre (Utah), 52 Pac., 628.

California Development Co. v. New Liverpool Salt Co.,
172 Fed. Rep., 792.

Briefly, the above-cited cases are as follows:

Willey v. Decker, *supra*, was an action brought in Wyoming by the claimants of certain water rights in Young's Creek, a stream rising in Montana and flowing into Wyoming. The complaint was similar to that in *Miller & Lux v. Rickey*, and the relief asked was the same. The diversions by some of the defendants were being made in Montana, the law of Montana being similar to that in California, and the law in Wyoming similar to that in Nevada. It was *held* (pp. 224-5) that the court in Wyoming had jurisdiction to restrain the diversions in Montana for the same reasons as those hereinbefore argued under the present head.

Deseret Irr. Co. v. McIntyre, *supra*, was a case in Utah. By the constitution of that State jurisdiction was confined to the court of the county in which the cause of action arises. The action concerned water rights in Sevier River, a stream flowing through two counties, San Pete and Millard, and was brought in the lower county, Millard, in which the plaintiffs' canals were situated, and the plaintiffs sought an injunction against diversions in the upper county, San Pete. On objection to the jurisdiction it was *held*, for the same reasons here urged, that the plaintiffs might have brought the action in either county, and the jurisdiction was therefore sustained. The decision was based upon reasons thus stated by the court (pp. 629-330):

"If the injury be to real property, as a trespass, or waste, or the like, an action therefor will be local, and the plaintiff must declare his injury to have happened in the county and place where it did actually happen; and if the acts which caused the injury in

one county were committed in another, or if the cause of action consists of two or more material facts which arose in different counties, the value at common law may be laid in either. [Citing authorities.] So, many actions, in which it is not sought to directly recover real property, are local at the common law, because they arise by reason of some local right or interest, or out of some local subject, such as the common-law actions of waste, trespass *quare clausum fregit*, trespass on the case for injuries to things real, as for obstruction or diversion of ancient water-courses, nuisances, waste, &c., to houses, lands, water-courses, right of way, or other real property. * * * The general doctrine at common law, no doubt, is that an action for injury to real property, as trespass, or case for nuisance, is local and must be commenced within the county or district in which the land lies. *Where, however, an act has been committed in one county or district, which caused injury to realty in another, suit may be brought in either. In such case the cause of action may be said to have arisen in either county.*" [Citing authorities.]

California Development Co. v. New Liverpool Salt Co., supra, was a suit for damages originally commenced in a State court of California and thence removed into the United States Circuit Court where "the complaint was framed as a bill in equity in accordance with the practice of Federal courts" to restrain the California Development Company from so diverting the waters of the Colorado River by itself and affiliated corporations from both sides of the international boundary line to the resulting flowing of the lands and property used by complainant in its business of mining, gathering and refining salt. In an elaborate opinion containing full review of the authorities, the United States Circuit Court of Appeals sustained the jurisdiction of the circuit court saying (page 813):

"Why may not a court restrain a party over whom
 "it has jurisdiction from injuring property within its
 "jurisdiction? How does it affect the question of

“jurisdiction or venue to say that the party on whom
 “the court must act may find it necessary to do
 “things outside the jurisdiction of the court in order
 “to comply with the order of the court? May this not
 “often happen, and would it not happen oftener, if it
 “were determined that such an excuse was sufficient
 “to defeat the jurisdiction of the court?”

A few words may be added as to cases cited by petitioner. In his brief, counsel repeatedly cites the following cases:

Howell v. Johnson, 89 Fed., 556,
Morris v. Bean, 123 Fed., 618,
Hoge v. Eaton, 135 Fed., 411,
Anderson v. Bassman, 140 Fed., 14,

as in some way opposed to us on this point. But none of those cases is in any way in point as to the matter now under discussion. In each of them the suit was brought in the *upper* State, which would be equivalent to California in the case now under discussion, and the jurisdiction, when attacked, was sustained. But not one of them held or intimated that the suit could not have been brought in the *lower* State, as here in Nevada. At the most, then, those cases might be cited as showing that the suit of *Miller & Lux v. Rickey* could have been brought in California. It may possibly be true that we *could* have brought that suit in California, and we would have had no objection to doing so except for two reasons: (1) that, even according to the express admissions of counsel for petitioner, another suit in Nevada would also have been necessary, and (2) that we knew of no way of obtaining, in California, jurisdiction of the *person* of Thomas B. Rickey, a citizen and resident of Nevada. But evidently the cases so cited cut no figure here, and counsel cites no other cases except, as we have said, cases of suits for the abatement of a nuisance.

2. *Irrespective of the question whether an action at law to redress the injuries complained of in Miller & Lux v. Rickey would or would not be considered to be local, a court*

of equity has jurisdiction to act in personam against a person within its jurisdiction, even as to acts committed without the territorial jurisdiction.

(a). Petitioner's argument assumes throughout that, with regard to *local* jurisdiction, the rules in courts of equity are the same as in those of law. In that we conceive that counsel is wholly mistaken.

The jurisdiction in equity was at first solely *in personam*, and at that time the only requirement as to jurisdiction was the ability to serve the defendant with process of subpoena within the territorial limits of the court. Later, various remedies *in rem* or *quasi in rem* were introduced, and for that reason it became necessary to formulate a rule applicable to such cases. That rule is that the court cannot by its decree act upon, or by its process reach, *property* not within its territorial limits; but otherwise the rule remains as before. Thus, a court of equity having jurisdiction of the *person* of a defendant may compel him to execute a conveyance of property in another country, but it cannot render a decree which will directly pass the title to that property or issue process to seize it. In order to determine what the defendant must do *within the country of the court*, it may consider his rights to property out of that country, or his liabilities arising in another country, and may, by process *against his person*, compel him to do or refrain from doing what the rights or liabilities so determined require; but it cannot act directly upon that property, and its decree will not affect the title to it. In fact it may be stated generally that nothing but jurisdiction of the *person* of a defendant is necessary to sustain the right of any court of equity to grant an *injunction*, upon a sufficient equity, even if that equity relates to property abroad, or even if the act forbidden is to be done abroad.

A leading case, very like the one here under discussion, is that of *Great Falls Mfg. Co. v. Worster*, 23 N. H., 462. That suit was brought in New Hampshire by one who had, and

claimed the right to maintain, a dam across a river, one end of which dam was in New Hampshire and one in Maine. The dam was used to supply water to mills in New Hampshire. The defendant, by virtue of his ownership of certain lands in Maine overflowed by the dam, claimed the right to destroy the end of the dam in Maine, and threatened to do so. It was held, on the grounds we have stated, that the New Hampshire court had jurisdiction of a suit to enjoin him from so doing. The opinion of that highly learned court in that case supports that doctrine by an unanswerable citation of authorities. That doctrine has uniformly been followed by the State courts in this country.

Schmaltz v. York Mfg. Co., 204 Pa. St., 1.

Alexander v. Folleston Club, 110 Ill., 65.

Williams v. Ayrault, 31 Barb., 364.

Manley v. Carter (Kans.), 52 Pac., 915.

Willey v. St. Charles Hotel Co. (La.), 28 So., 187.

Clad v. Paist, 181 Pa. St., 148.

It is also expressly declared in the following:

Story, Eq. Jur., §§ 743, 744, 899, 900.

1 *High on Injunctions*, §§ 103-107, 803.

Gage v. Riverside Trust Co., 86 Fed., 984, 988.

Remer v. McKay, 54 Fed., 432, 434.

But nowhere has that doctrine been more emphatically and uniformly declared than by this court.

Massie v. Watts, 6 Cr., 148.

Muller v. Dows, 94 U. S., 444, 448.

Phelps v. McDonald, 99 U. S., 298, 308.

Cole v. Cunningham, 133 U. S., 107.

Moran v. Sturges, 154 U. S., 286.

Dull v. Blackman, 169 U. S., 243.

Fall v. Easton, Oct. Term, 1909, No. 24, 215, U. S., Part I, p. 1.

Those cases settle the rule that, although a court is not competent to act directly upon real property in another country, or to render a decree operating directly on the title to that property, nevertheless it *is* competent to act upon the person and conscience of a defendant within its territorial jurisdiction, and to require him to act or refrain from acting, as to that property, in a manner contrary to equity.

Counsel for petitioner contends that this rule is *limited* by the language in *Massie v. Watts, supra*, that this rule applies "in a case of fraud, of trust, or of contract." But those words were evidently not used as words of limitation or as meaning that the rule could not apply in any other case, and the reason there given for the rule is equally applicable to many other cases, and certainly to such a case as is here under consideration. But in the later cases of *Phelps v. McDonald, supra*, and *Dull v. Blackman, supra*, the court stated the rule without any such qualification and in language clearly implying that no such qualification exists. Thus, in *Phelps v. McDonald*, the court stated the rule thus:

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

"Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*."

Counsel for petitioner cites the case of *Northern Indiana R. Co. v. Mich. Cent. R. Co.*, 15 How., 233, as in opposition to this rule. If there is anything in that case inconsistent with the rule contended for by us it is necessarily contrary to the later decisions of this court above cited.

Counsel also cites the case of *Miss., &c., R. Co. v. Ward*, 67 U. S., 485. But that case was expressly one *to abate a nuisance*, and the remedy there sought was therefore not *in personam*, and that case is therefore not in point.

Even, then, if counsel were correct in stating that the *res* of this controversy is in California that fact would not impair the jurisdiction of the Nevada court; for the remedy there sought is only an injunction against Rickey, to be enforced solely by process against his *person*, and no decree is asked as to any property, or the title to any property, in California.

(b) There is another consideration here which points in the same direction. Not only has the Nevada court jurisdiction of the person of Rickey, but he is, in fact, a citizen and resident of that State and subject to its laws, and the property which he is alleged to be injuring is property in that State. Those laws forbid him to injure that property in that manner. Can it be said that the courts of Nevada have no power to compel a citizen of that State to obey its laws, or that he can defend himself in those courts by showing that he went out of the State to break its laws, and committed his infractions elsewhere? The contrary was expressly held in the above-cited case of *Great Falls Mfg. Co. v. Worster*, 23 N. H., 462, and we submit that the law must necessarily be so. The power of a State to enforce obedience to its laws certainly extends to all its citizens, as well when they are abroad as when they are at home. In *The Apollon*, 9 Wheat., 362, 370, Mr. Justice Story said: "The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens.*" Of course if such a citizen while in a foreign State does there an act *required* by the law of the latter State, it may be that the former State could not—it certainly should not—punish him therefor; but that is not this case. We submit that if there were no other ground the jurisdiction of the Nevada court could be sustained on this one.

1 *Bishop New Crim. Law*, §§ 121, 110.

State v. Lord, 16 N. H., 357.

Com. v. Smith, 11 Allen, 243, 259.
Kinney v. Com., 30 Gratt., 858.
Ex parte Kinney, Fed. Cas., 7825, p. 607.
Brook v. Brook, 9 H. L. Cas., 193.
Story, Conflict of Laws, §§ 21-22.

See also:

Cole v. Cunningham, 133 U. S., 107, 119.

Before leaving this point it will be well to refer to a position taken by petitioner with regard to it. Its counsel calls *Miller & Lux v. Rickey* a suit to quiet title, and he refers to the fact that the Circuit Court of Appeals, in its opinion in this case (pages 43, 44), so designates it. The matter is probably not important, but we desire to respectfully express our entire dissent from that view.

A suit to quiet title is one where a decree is prayed as to the title; and there is nothing of the kind in the case in question. That is merely a suit to enjoin the commission of a tort, and no quieting of title or other adjudication as to title is asked. The mere fact that the bill alleges complainant's title is of no importance. It is a part of the complainant's *cause* of suit that it owns the property which the defendants are alleged to be injuring; but the same would be the case in an ordinary action of trespass or trespass on the case. To call such a suit one to quiet title is to sweep away all distinctions with regard to actions and remedies.

While therefore we contend that the action of *Miller & Lux v. Rickey* was not a suit to quiet title to the complainant's property, still if the action had been brought in that form and expressly for the purpose of quieting the complainant's title, it has been held that the courts of Nevada would have jurisdiction although the defendant diverted the water in California for the irrigation of land in that state.

Taylor vs. Hulett (Idaho), 97 Pac., 37; 19 L. R. A. N. S., 535.

II.

THE ISSUES IN THE ACTIONS BROUGHT BY PETITIONER IN THE STATE COURT ARE ISSUES IN THE SUIT OF MILLER & LUX V. RICKEY; AND THOSE ACTIONS WOULD MATERIALLY INTERFERE WITH THAT SUIT, AND IMPEDE AND EMBARRASS THE CIRCUIT COURT IN DISPOSING OF IT.

The doctrine that the court which first obtains jurisdiction of the *res* in controversy is entitled to dispose of the controversy without interference from another court, and that it may enjoin a party from meanwhile commencing or prosecuting, against the other parties, a suit with relation thereto in any other court, is well settled, and if the later suit raises any issue which exists in the first suit its prosecution will be enjoined so far as it relates to that issue.

Prout v. Starr, 188 U. S., 537.

Pitt v. Rodgers, 104 Fed., 387.

Riverdale Cotton Mills v. Alabama, &c., Co., 11 Fed., 431.

Home Ins. Co. v. Virginia, &c., Co., 109 Fed., 681.

State Trust Co. v. Kansas City, &c., Co., 110 Fed., 10.

Central Trust Co. v. Western, &c., Co., 112 Fed., 471.

Mercantile, &c., Co. v. Roanoke, &c., Co., 109 Fed., 3.

Stewart v. Wisconsin Cent. R. Co., 117 Fed., 782.

Starr v. Chicago, &c., Co., 110 Fed., 3.

The facts in this case are well within the decisions in those cases.

Counsel for petitioner does not dispute that general rule, but he contends that the issues in the suits in the State court are wholly different from those in *Miller & Lux v. Rickey*, and that they cannot interfere with the action of the circuit court in that suit.

As against the defendant Rickey, the main issue tendered by the bill in *Miller & Lux v. Rickey* is that the complainant

owns the right to have the waters of Walker River flow from their source down to its lands and ditches in Nevada, that Rickey has no right to prevent them from so flowing, and that ne is making and threatening to continue to make diversions from said river above the complainant's lands and ditches, which diversions do prevent the water from reaching complainant, to its injury.

In its actions in the State court, the petitioner alleges (pages 4-5, 6-7) that it has the right to divert, in California, practically all the water of said river, and that *Miller & Lux* claim some right, title, or interest in and to said water adverse to petitioner, which claim is without right and subordinate and subject to said alleged right of petitioner.

In the suit in the circuit court *Miller & Lux* pray that Rickey be enjoined from making the diversions complained of, and, in the actions in the State court, petitioner prays that it be adjudged that it is the owner of the right claimed by it, that it be adjudged that *Miller & Lux* has no right, title, interest, claim, or estate in said water, and that *Miller & Lux* be adjudged to be estopped to claim or assert against petitioner any right, title, claim, interest, or estate in or to said waters.

The bare statement of these different claims and issues is obviously sufficient to show that they conflict with each other.

We are not sure that we understand the position of counsel on this subject. As to his general argument: It may be true that no judgment in the State court *can* interfere with the decree of the circuit court, *when that shall be rendered*, for the latter court first acquired jurisdiction of the controversy (*Sharon v. Sharon*, 84 Cal., 424). But, in the meantime, *Miller & Lux* are entitled to the protection of the circuit court against being compelled to go and try the same issues in another court, and even to obey, *pro tempore*, a judgment of the latter court, should that be first rendered. Indeed there are even some authorities which hold that in such case the judgment of the State court might effectually

be pleaded as *res judicata* in the suit in the circuit court. While we do not agree with that doctrine we certainly should not be compelled to take that risk. The circuit court, having first acquired jurisdiction of that controversy, has possession of it and is entitled to retain exclusive possession of it at all times to the end, no matter what shapes it may assume.

As we have said, an examination of the pleadings in these different cases immediately shows, beyond question, that the issues in them *are* the same. The State court *cannot* render judgment in favor of the petitioner as prayed for in the actions before it without deciding that petitioner has the right to prevent the water of Walker River from reaching Miller & Lux in Nevada.

In his argument on this subject, counsel largely relies on the same grounds taken by him with respect to the question of *jurisdiction*. Of course, we need not follow him as to that. If the circuit court has no jurisdiction that, of course, is an end of this case, but if it *has* such jurisdiction the only question is whether the *res* or issue in both cases is the same, or in part the same.

Counsel seeks to predicate an argument on the fact that the actions in the State court are suits to quiet title, a relief which, he says, the petitioner could in no way obtain in *Miller & Lux v. Rickey*. Even if that were true, it would not affect this case. The identity of the *res* or issues, or some of them, in the suits in different courts, and not the identity of the relief sought, is the test, and the only test, of the right to an injunction in this class of cases. If in the orderly prosecution of the suit last brought it may become necessary for the court to *decide* some issue which exists in the suit first brought, then injunction will lie to forbid the party from *trying that issue* in the suit last brought, and that, irrespective of the *use* which he desires to make of such decision.

In that particular, petitioner would be in no worse position than every defendant must be whenever any suit is

brought against him. If it had chosen to sue Miller & Lux before that suit was begun, it might have elected its own forum, kind of action, or relief. But when it has once been sued it cannot be allowed to go into some other court and give that court jurisdiction over the same *res*, or try, in that court, any issue in the suit so brought against it. Thus, one in possession of land may, before ejectment brought against him, maintain a suit to quiet his title against an adverse claimant, but after ejectment *has* been brought, he cannot bring, in some other court, a suit to quiet title *to the same land*, against that plaintiff in ejectment.

But counsel's premise is not correct. What is a decree quieting title? It is merely a judicial declaration that the party has the right which he claims. It can be enforced only by pleading it, in some other suit, as *evidence*. Exactly that relief is available to any defendant in *Miller & Lux v. Rickey*. In that case Rickey may answer the bill, as, in fact, he has done, by confessing the diversions complained of and justifying them by an alleged superior right in himself. The court, in that case, would then have to determine whether Rickey has or has not such superior right and, if it decides that he has, that decision may be put in evidence, in any other case, as an estoppel, with the same effect as a decree expressly quieting his title. Petitioner then could have obtained, in the suit of *Miller & Lux v. Rickey*, all the relief it needs.

In each of these suits the *res* is the water of Walker River and in the actions brought by petitioner in the State court it prays, among other things, that it be adjudged that Miller & Lux is estopped to claim or assert against it any right or interest in any water of Walker River in California. In view of the fact, repeatedly admitted by counsel for petitioner, that the lower proprietor has an interest in the water of the stream *to its source*, a judgment such as is so prayed for would effectually nullify any effort of Miller & Lux to obtain any decree in its favor in the suit brought by it in the circuit court. In the face of such a prayer it is idle for

petitioner to assert that it is not seeking to interfere with the suit of *Miller & Lux v. Rickey*. The necessary result of the actions so brought by it is to entirely supplant the prior suit and to remove the forum in which the contest must be litigated to the State court.

III.

THE "RICKEY LAND AND CATTLE COMPANY" IS BUT ANOTHER NAME FOR THOMAS B. RICKEY; AND EVEN IF THAT BE NOT SO, IT WAS MERELY A PURCHASER PENDENTE LITE OF THE INTEREST AND CLAIM OF RICKEY TO THE RES INVOLVED IN THE SUIT, AND THEREFORE BOUND BY THE DOCTRINE OF LIS PENDENS.

(a) As we have said, the bill in this case alleged (Rec., pp. 3-4) that Rickey is the only person really interested in the corporation petitioner, or really owning any of the stock thereof, and that the other persons in said corporation are merely his nominees and hold their stock solely for him. If that be true, the petitioner is a *privy* with the defendant Rickey and bound by the suit to the same extent as he is.

On that subject, however, petitioner filed three affidavits, the material portions of which are as follows:

The affidavit of Thomas B. Rickey says (pages 23-24):

"That Charles Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company; and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all

times since the organization of said corporation, have been, in the absolute control of said stock, free from any right by interference, management, or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey, and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so owned and held by them for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars."

The affidavit of Charles Rickey says (page 26) :

"That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (\$20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

"That Thomas B. Rickey does not own, nor has he at any time owned, any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey."

The affidavit of Alice B. Rickey says (page 27):

"That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation, owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (\$20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

"That Thomas B. Rickey does not own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey."

It is obvious that those statements are not such explicit denials of any matter alleged in the bill as could avail defendant on this motion.

It is not alleged in either of those affidavits that either Alice B. Rickey or Charles Rickey gave any valuable consideration for the stock so alleged to be owned by them, or what proportion that stock bears to the whole stock of the corporation. For all that there appears, it may be—and we have the right to assume—that they are respectively the wife and son of Thomas B. Rickey, that he made them a *gift* of those shares, and that those shares represent only a very small fraction of the capital stock of the corporation. Those we believe to be the facts, and, at any rate, it was for petitioner to show the contrary, if it could.

Under such circumstances the court below had discretion to issue the injunction. Counsel does not dispute the *prin-*

ciple on which we rely, and, as to the *facts*, the court below had the right, in view of the evasive nature of the statements of those affidavits, to decide, as it did decide, that there is an obvious probability that we will succeed, on the hearing, in proving the truth of the allegations of our bill—which is a sufficient ground for the granting of an *interlocutory* injunction.

(b) In the court below counsel sought to rely on that portion of the affidavit of Thomas B. Rickey (page 23) which reads as follows:

“But the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey are not the same rights to water and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said lands by Thomas B. Rickey, and said water rights and the right to the use of water to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusive and peaceably.”

But it is obvious that since it is not denied that the only rights which the Rickey Land and Cattle Company claims to be *prior* to those of Miller & Lux were derived solely from the conveyance from Thomas B. Rickey, and as appropriations made by it *since* the commencement of the suit of *Miller & Lux v. Rickey* are necessarily subject to that suit, that portion of that affidavit does not avail to traverse the allegations of our bill. In every point of view, then, it is clear that the

Rickey Land and Cattle Company, for all the purposes of this suit, stands merely in the shoes of Thomas B. Rickey, and will be bound by what binds him.

(c) That a purchaser *pendente lite* is bound by a decree in equity in a Federal court, to the same extent as if he had been expressly made a party, is elementary law.

Mellen v. Moline, &c., Works, 131 U. S., 352, 370.

1 *Freeman on Judgments*, §§ 191, 193.

See also:

Majors v. Cowell, 51 Cal., 478.

Counsel for petitioner, while not disputing this rule, seeks to limit its application to cases affecting property within the local jurisdiction of the court and described in the bill.

It is not necessary for us to consider whether or not counsel has correctly stated the rule; for this case is fully within the most extreme rule for which he contends.

As we have indicated in Point I, the subject-matter of the suit of *Miller & Lux v. Rickey* is *property* which, if it has a local *situs* at all, has that *situs* in Nevada. The *res* with which it is concerned is the water of Walker River. Whatever interest *any one* has in that stream is merely a usufructuary right, which he holds *in common* with every other person having any interest. No one has any ownership in the *corpus* of the water while it continues to run in the channel of the stream. His interest, *at the most*, is the right to have the stream flow *to* him and the right to take from it some portion, ascertained or unascertained, of its water. Persons having such rights are, in the strictest sense, tenants in common in the entire stream. The object of the suit in question is to protect the right of the complainant to the water. The right of the complainant, as alleged in its bill, is to have that stream flow to its land *in Nevada*, undiminished in quantity by any unlawful diversion *above* those lands, and to take from the stream, *in Nevada*, certain portions of its waters. The bill is therefore one as to property which is in Nevada.

The doctrine of *lis pendens*, therefore, applies to the suit in question, even if that doctrine be limited as counsel claims.

Counsel's error is in supposing that the rights of the Rickey Land and Cattle Company sought to be protected by its actions in the State court consist in its *lands* in California, which, of course, are not described in our bill and are not, in themselves, within the local jurisdiction of any court in Nevada. But it is clear that the *res* in those actions is the same as that in our suit, namely, the *water* of Walker River. If that corporation has the right which it claims in those actions it is, in essence, the right to divert so much of the water of that river as to prevent Miller & Lux from receiving, *in Nevada*, the water it is there entitled to receive. The claim which it makes is therefore a claim to the very property involved in our suit; and, that claim being based upon a conveyance made to it, *pendente lite*, by a defendant in that suit, it took subject to that suit, and is to be treated now just as if it were formally a party to that suit.

(d) But the propriety of the injunction against the Rickey Land and Cattle Company may be justified on much broader grounds than the doctrine of *lis pendens*. It must be admitted that if an injunction would have been proper against Rickey, if he had instituted the suit, it is proper against any one who would be bound by a judgment against Rickey. While it is true that equity acts *in personam*, still an injunction will often be binding upon any person or corporation claiming under the defendant. If the grantee claims under the same right as the defendant, he will be bound by an injunction against his grantor.

High on Injunctions, sec. 1548.

Ahlers v. Thomas, 24 Nevada, 407; 56 Pac., 93; 77 Am. S. R., 820.

Wimpey v. Phinizy, 68 Ga., 188.

Bate Refrigerating Co. v. Gillett, 30 Fed., 685.

Mayor v. N. Y. & Staten Island Ferry Co., 64 N. Y., 622.

The case of *Ahlers v. Thomas, supra*, is a good illustration of this rule. In that case the defendant had been enjoined from diverting water from a certain stream. He afterwards conveyed his rights in the stream to another party, who attempted to divert the water, and it was held that the grantee was bound by the injunction. So if the Nevada court had proceeded to judgment and enjoined Rickey from diverting water that injunction would have been binding upon his grantee, the Rickey Land and Cattle Company. Especially would this be true where the formation of the corporation was a clear subterfuge to avoid the effect of the judgment (*Mayor v. N. Y. & Staten Island Ferry Co., supra*).

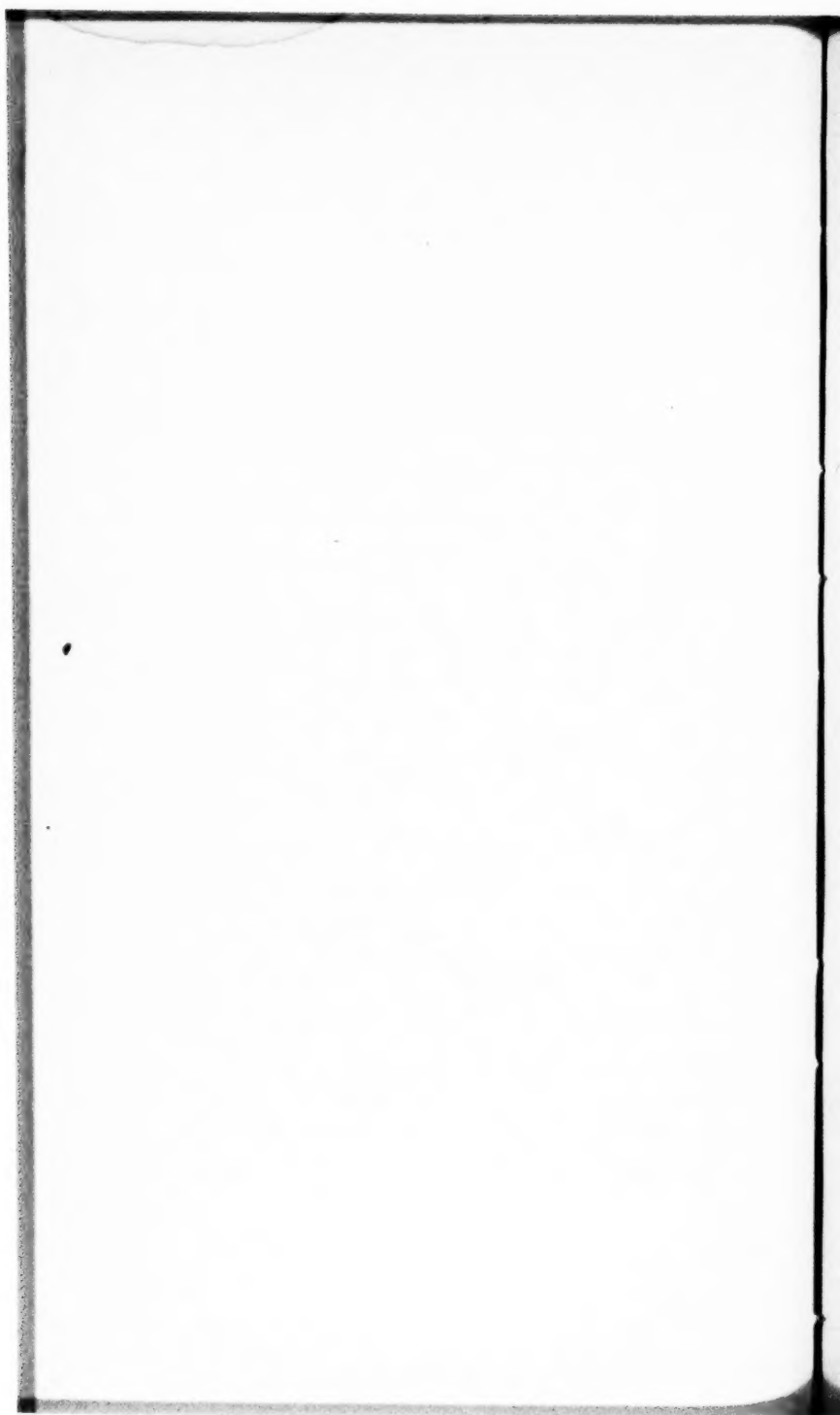
We therefore submit that the decree of the circuit court was correct, and that the Circuit Court of Appeals was right in affirming it.

Respectfully submitted,

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Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 4.

Office Supreme Court,
FILED.

OCT 18 1910

JAMES H. McKENNA

RICKEY LAND & CATTLE COMPANY, PETITIONER,

vs.

MILLER & LUX, RESPONDENT.

No. 5.

RICKEY LAND & CATTLE COMPANY, PETITIONER,

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HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
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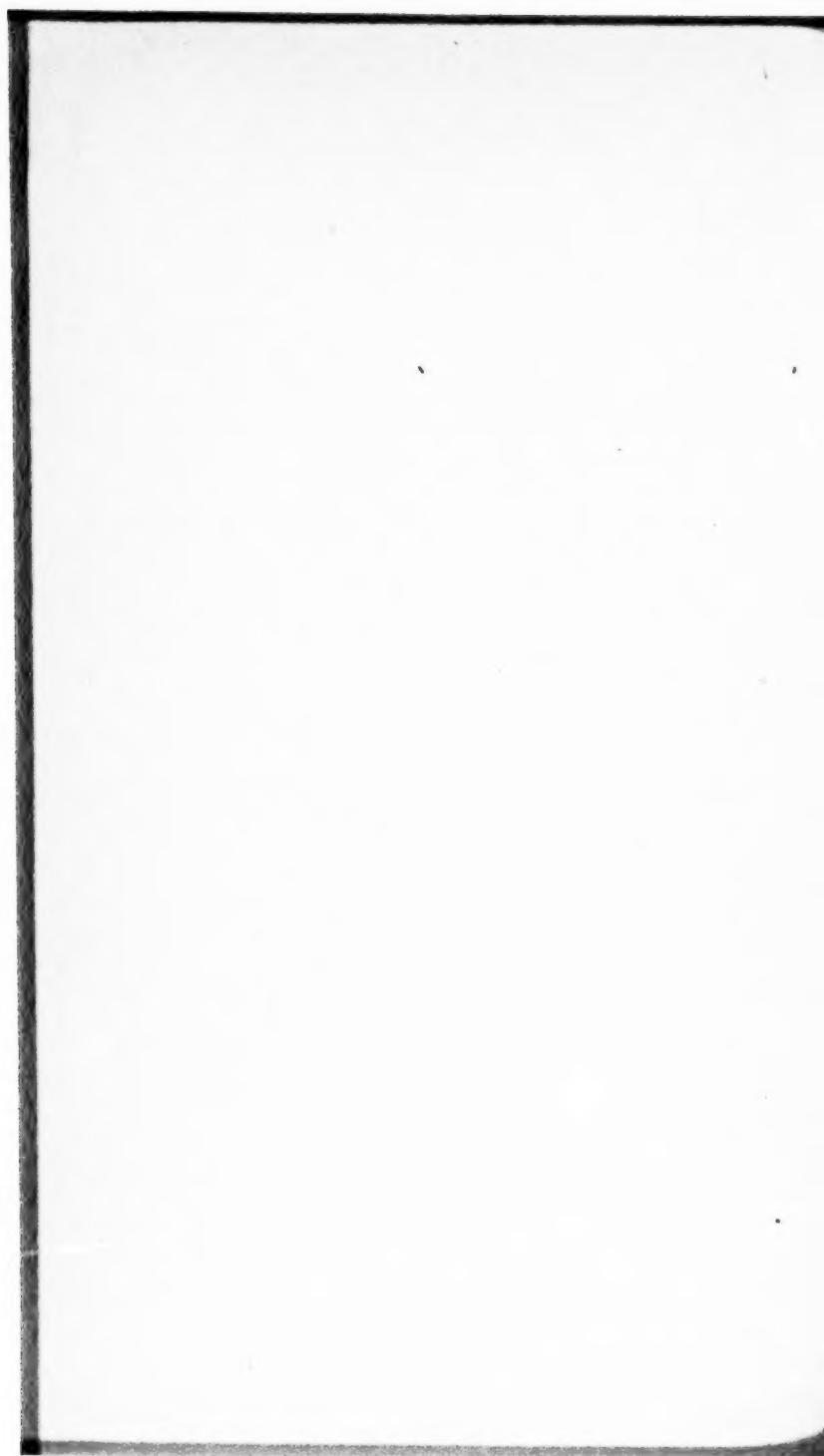


TABLE OF CONTENTS.

	Page.
I—Property rights in a water-course, whether they be said to be acquired from the Federal Government by virtue of the grant of public lands or by virtue of the recognition by the Federal Government of the right to appropriate the same or from the State in which the rights are claimed, extend through the entire course of the river and exist irrespective of political lines	3
<i>Kansas v. Colorado</i> , 206 U. S., 46;	
<i>United States v. Rio Grande Irrigation Co.</i> , 174 U. S., 690, 703-4;	
<i>Rundle v. Delaware & R. Canal</i> , 1 Wall., Jr., 275, Fed. Cas. 12139 (affirmed without reference to this point, 14 How., 80; 14 L. Ed., 335);	
<i>Howell v. Johnson</i> , 87 Fed., 556;	
<i>Morris v. Bean</i> , 123 Fed., 618;	
<i>Hoge v. Eaton</i> , 135 Fed., 411;	
<i>Anderson v. Bassman</i> , 140 Fed., 14.	
II—Where water is wrongfully diverted in one State (necessarily the upper State) to the injury of land entitled to the water in another State (necessarily the lower State) the courts of either State have jurisdiction to grant relief, and in the exercise of such jurisdiction to determine the relative rights of the parties to divert water from the stream in either State	9
Common-law rule as to counties	10
<i>Bulwer's Case</i> , 7 Coke, 1;	
<i>Comyn's Digest</i> , Tit. "Action," N. 11;	
1 <i>Saunders's Pleading and Evidence</i> , 413;	
<i>Scott v. Brest</i> , 2 T. R., 238;	
<i>Barden v. Crocker</i> , 10 Pick., 383;	
<i>Pilgrim v. Mellor</i> , 1 Ill. App., 448;	
<i>Oliphant v. Smith</i> , 3 P. and W. (Pa.), 180;	
<i>Gould on Pleading</i> , 105;	
<i>Taylor v. Cole</i> , 3 T. R., 292;	
<i>Doulson v. Mathews</i> , 4 T. R., 503;	
<i>Livingston v. Jefferson</i> , Fed. Cas. 8411.	
Applicable to States	12
<i>Rundle v. Delaware & R. Canal</i> , 1 Wall., Jr., 275, Fed. Cas. 12139.	

	Page.
Cases holding that courts of a lower State have jurisdiction of acts committed on interstate stream in upper State...	13
<i>Thayer v. Brooks</i> , 17 Ohio, 487;	
<i>Deseret Irrigation Co. v. McIntyre</i> (Utah), 52 Pac., 628;	
<i>Willey v. Decker</i> (Wyo.), 73 Pac., 210;	
<i>Taylor v. Hewlett</i> (Idaho), 97 Pac., 37; 19 L. R. A., N. S., 535;	
<i>California Development Co. v. New Liverpool Salt Co.</i> , 172 Fed., 792;	
<i>Smith v. Southern Railway Co.</i> (Ky.), 123 S. W., 678.	
Cases holding that courts of the upper State at the suit of a party injured in the lower State may grant the necessary relief.....	16
<i>Stillman v. White Rock Mfg. Co.</i> , 3 Wood & M., 538, Fed. Cas. 13446;	
<i>Banigan v. Worcester</i> , 30 Fed., 392;	
<i>Ducktown Sulphur, etc., Co. v. Barnes</i> (Tenn.), 60 S. W., 593, 606;	
<i>Howell v. Johnson</i> , 89 Fed., 556;	
<i>Hoge v. Eaton</i> , 135 Fed., 411;	
<i>Anderson v. Bassman</i> , 140 Fed., 14.	
Remarks on cases relied upon by petitioner.....	19
<i>Stillman v. White Rock Mfg. Co.</i> , 3 Wood & M., 538, Fed. Cas. 13446;	
<i>Conant v. Deep Creek Carlew F. I. Co.</i> , 23 Utah, 627;	
<i>Lampson v. Vaile</i> , 27 Colo., 201; 61 Pac., 231;	
<i>Ducktown Sulphur, etc., Co. v. Barnes</i> , 60 S. W., 593;	
<i>Northern Indiana Railway Company v. Michigan Central Railway Co.</i> , 15 How., 233;	
<i>Mississippi, etc., v. Ward</i> , 67 U. S., 485.	
III—1. Where two courts have concurrent jurisdiction, the first court which acquires jurisdiction of the subject-matter in controversy will retain that jurisdiction to the end and may enjoin the parties from prosecuting any other suit in any other tribunal involving the same issues.....	24
<i>Prout v. Stars</i> , 188 U. S., 537;	
<i>Pitt v. Rodgers</i> , 104 Fed., 387;	
<i>Riverdale Cotton Mills v. Alabama, &c., Co.</i> , 11 Fed., 431;	
<i>Home Ins. Co. v. Virginia, &c., Co.</i> , 109 Fed., 681;	
<i>State Trust Co. v. Kansas City, &c., Co.</i> , 110 Fed., 10;	
<i>Central Trust Co. v. Western, &c., Co.</i> , 112 Fed., 471;	
<i>Mercantile, &c., Co. v. Roanoke, &c., Co.</i> , 109 Fed., 3;	
<i>Stewart v. Wisconsin Cent. R. Co.</i> , 117 Fed., 782;	
<i>Starr v. Chicago, &c., Co.</i> , 110 Fed., 3;	
<i>Gage v. Riverside Trust Co.</i> , 86 Fed., 984, 988.	

CONTENTS.

III

Page.

2. Section 720 of the Revised Statutes does not prevent a court of the United States which has acquired jurisdiction of a particular controversy from enjoining the parties thereto from prosecuting a subsequent action in relation thereto in the courts of a State	25
<i>Taylor v. Taintor</i> , 16 Wall., 370;	
<i>French v. Hay</i> , 22 Wall., 253;	
<i>Kern v. Huidekoper</i> , 103 U. S., 494;	
<i>Ex parte Sawyer</i> , 124 U. S., 200;	
<i>Freeman v. Howe</i> , 24 How., 450;	
<i>Hardraker v. Wadley</i> , 172 U. S., 148.	
3. Where a court of equity has acquired jurisdiction by reason of its jurisdiction over property within the territorial jurisdiction of the court, or by reason of its jurisdiction of parties residing within its jurisdiction and against whom an equitable cause of action exists growing out of fraud, trust, contract, or other basis of equitable jurisdiction, it may retain jurisdiction and give complete relief, although it may be necessary, in so doing, to pass upon rights to property situated in another State or country...	28
<i>Great Falls Mfg. Co. v. Worster</i> , 23 N. H., 462;	
<i>Schmaltz v. York Mfg. Co.</i> , 204 Pa. St., 1;	
<i>Alexander v. Tolleston Club</i> , 100 Ill., 65;	
<i>Williams v. Ayrault</i> , 31 Barb., 364;	
<i>Manley v. Carter</i> (Kans.), 52 Pac., 915;	
<i>Willey v. St. Charles Hotel Co.</i> , 52 Pac. (La.), 182, 187;	
<i>Clad v. Paist</i> , 181 Pa. St., 148;	
<i>Remer v. McKay</i> , 54 Fed., 432, 434;	
<i>Massie v. Watts</i> , 6 Cr., 148;	
<i>Muller v. Downs</i> , 94 U. S., 444;	
<i>Phelps v. McDonald</i> , 99 U. S., 298;	
<i>Cole v. Cunningham</i> , 133 U. S., 107;	
<i>Moran v. Sturges</i> , 154 U. S., 286;	
<i>Dull v. Blackman</i> , 169 U. S., 243;	
<i>Fall v. Eastin</i> , 215 U. S., 1;	
<i>Muller v. Downs</i> , 94 U. S., 444	
Conclusion.	38



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 4.

RICKEY LAND & CATTLE COMPANY, PETITIONER,

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ADDITIONAL BRIEF FOR RESPONDENTS.

In view of the argument in these cases at the last term of this court we are now able to fully understand the relative positions taken by the parties to the controversy, and also the points on which the court is most likely to desire all the light possible in reaching a determination therein. In view of the

wide general interest involved in the cases we feel that the court will welcome such further presentation of the cases as the parties are now able to make, and the result of such further research as the parties have made since the prior argument in the cases, and for that reason we have filed this additional brief covering somewhat more in detail the original briefs filed in the cases, and also presenting certain questions in the cases in slightly different aspects.

The cases in a general way present three main questions:

First. What are the relative rights of riparian owners and appropriators on streams passing through two or more States?

Second. What tribunals have jurisdiction to determine such rights?

Third. Where one tribunal, having jurisdiction to determine such rights, has acquired jurisdiction of the rights of particular parties by the institution of a proper suit and the service of process, may it enjoin such parties from interfering with its jurisdiction by invoking the jurisdiction of some other tribunal having concurrent or partial jurisdiction over the same subject-matter?

These three main questions include many minor questions, some of which are, and some of which are not necessarily involved in these cases, and in presenting this case we shall limit the discussion to the questions which we deem to be necessary to the determination of these cases, leaving other questions to be considered when they arise.

I.

PROPERTY RIGHTS IN A WATERCOURSE, WHETHER THEY BE SAID TO BE ACQUIRED FROM THE FEDERAL GOVERNMENT BY VIRTUE OF THE GRANT OF PUBLIC LANDS, OF BY VIRTUE OF THE RECOGNITION BY THE FEDERAL GOVERNMENT OF THE RIGHT TO APPROPRIATE THE SAME, OR FROM THE STATE IN WHICH THE RIGHTS ARE CLAIMED, EXTEND THROUGH THE ENTIRE COURSE OF THE RIVER AND EXIST IRRESPECTIVE OF POLITICAL LINES.

This rule we believe to be now so well established by all courts that a reference to the following authorities will be sufficient:

Kansas vs. Colorado, 206 U. S., 46.

United States vs. Rio Grande Irrigation Co., 174 U. S., 690, 703, 704.

Rundle vs. Delaware & R. Canal, 1 Wall., Jr., 275, Fed. Case 12139 (affirmed without reference to this point 14 How., 80; 14 L. Ed., 335).

Howell vs. Johnson, 89 Fed., 556.

Morris vs. Bean, 123 Fed., 618.

Hoge vs. Eaton, 135 Fed., 411.

Anderson vs. Bassman, 140 Fed., 14.

One of the earliest cases in which this question arose was the case of *Rundle vs. Delaware & R. Canal*, *supra*, and in a note to the very elaborate report of that case will be found an opinion by Mr. Richard Stockton, in which it is stated in reference to a stream separating two States:

"Then may not either State appropriate the waters washing her own shores to public improvements? And what is the just limitation of the right if it exists? These questions depend upon the received law of nations—the only rule of action between independent States, and upon a just application of its

principles to the subject before us. The most approved writers of the law of nations consider the property in a river belonging to two States as absolute in each to its own half part—and content themselves with laying down the limitations to such absolute property, which rightfully arise out of the common claim to the waters of the river—and these limitations are made to depend upon that great principle of justice adopted by all codes of law that each must so use his own right as not to destroy or materially injure the right of the other.”

In the case of *Hoge vs. Eaton*, *supra*, the court used the following language in regard to a stream running through two States:

“The idea of an exclusive right of the people of a State to divert its running waters to the injury of riparian owners in another State must be equally untenable. Indeed the doctrine of riparian ownership and use of running water is not subject to political boundaries. Between hostile States the doctrine may not be recognized, but any such repudiation would be simply *vis major*. Between States dwelling in peace and concord, as are the States of our Union, the equal right of the inhabitants of each State to the waters of interstate streams must alway be recognized. Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of men, other than the mighty barriers which the Creator has made on the face of the earth.”

Starting with this premise, it may be urged that the two States may adopt different rules governing the distribution and use of the waters of the stream. In other words, according to the strict rules of the common law, the stream would flow through both States practically without diminution and no very serious question could arise as to the rights of various parties thereto, but in the arid States of the West such a condition is recognized by all to be inapplicable and in

all a beneficial use of the water is permitted. In some States the right to this beneficial use is held to be in the owners of the land, which by nature is made riparian to the stream. In other States it is held to belong to the public generally, and by license of the State any person is permitted by what is termed "appropriation" to make a beneficial application of the water in such State. But it should be always borne in mind that, whether the right is held to belong to the owners of the riparian lands or to belong to the public, any laws adopted by the State or enunciated and enforced by the courts thereof are only in relation to the use of such title as the State may have to the water, in view of the like right of other States through which the stream may flow. Keeping in view this fact, it is easy to see why the courts have not permitted diverse legislation, or diverse judicial decisions in the various States, to in any way affect the principle of the common ownership of the two States in an interstate stream. Thus in the case of *United States vs. Rio Grande Irrigation Company, supra*, the court used the following language on this subject:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * *

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion, a State may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.
* * *

"Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the Government property."

In the case of *Anderson vs. Bassman, supra*, the court used the following language, which is directly applicable to the situation in the cases at bar:

"It follows from these authorities and others that might be cited that whether the water is taken from the stream in California by the riparian owner for the purpose of irrigation, or is taken from the stream in Nevada by the appropriator for the same purpose, the right is equally sanctioned by law and is subject to the same limitations; that is to say, the right to use the water from the stream for irrigation purposes in either State under either right, must be a reasonable use, to be determined by the circumstances of each case and with due regard to the rights of others having the same beneficial use in the waters of the stream."

The question was probably considered more carefully than in any other case by this court in the case of *Kansas vs. Colorado, supra*, where it is said:

"Now the question arises between two States, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for, or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several States. * * *

* * * * *

"What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages, and rules of action applicable to the Government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

"As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. * * *

* * * * *

"One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri vs. Illinois*, *supra*, the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations

of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purpose of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

* * * * *

"This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States, and so adjust the dispute upon the

basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream."

II.

WHERE WATER IS WRONGFULLY DIVERTED IN ONE STATE (NECESSARILY THE UPPER STATE) TO THE INJURY OF LAND ENTITLED TO THE WATER IN ANOTHER STATE (NECESSARILY THE LOWER STATE), THE COURTS OF EITHER STATE HAVE JURISDICTION TO GRANT RELIEF, AND IN THE EXERCISE OF SUCH JURISDICTION TO DETERMINE THE RELATIVE RIGHTS OF THE PARTIES TO DIVERT WATER FROM THE STREAM IN EITHER STATE.

While it is claimed, and may possibly be true, that this precise question has never been definitely passed upon by this court, still, as this court has frequently remarked, the principles of the common law are sufficiently elastic to be readily applied to new conditions which modern invention is constantly creating, and in this particular case the most ancient and well-established rules of the common law may be invoked and applied as automatically as if they had been framed with this precise question in view.

Before taking up, however, the rules on this subject it might be well to refer to the argument made by the petitioner to the effect that if it be held that the courts of the State of Nevada may enjoin a diversion of water in the State of California, then a court in Louisiana might enjoin the diversion of water from the Missouri river in the State of Montana. This, of course, presents a very picturesque argument, but legal principles can hardly be tested by strained and unlikely applications, for those principles must necessarily be based on something more rational and enduring than mere distance. It might be argued with equal force that if it should be held that the courts of Nevada could *not* enjoin the diver-

sion of water in the State of California to the injury of land in the State of Nevada, then it would follow that they could not enjoin the discharge of dynamite in California within a foot of the line of the State of Nevada to the injury of a building in the State of Nevada and within a foot of the State of California. The truth of the matter is that the same principle which would permit a court in the State of Nevada to punish for murder a person who, in the State of California, discharged a gun, killing a person in the State of Nevada, is applied by the courts to a person who, in the State of California, sends through the United States mail a poisoned box of candy, causing the death of a person in the State of Delaware. (See *People vs. Botkin*, 9 Cal. App., 244; 22 U. S. Sup. Ct. Rep., 939.) The same rule which is applied where territorial distance is slight is applied where the territorial distance is great. Eliminating, then, this argument as adding nothing to the merits of the controversy, the rule of venue and jurisdiction at common law on this subject is plain, simple, direct, and universal, and that rule is that where an injury consists of an act committed in one jurisdiction to the damage of property situated in another jurisdiction the courts of either jurisdiction may grant relief.

Bulwer's case, 7 Coke, 1.

Comyn's Digest, Tit. "Action," N. 11.

1 *Saunders' Pleading and Evidence*, 413.

Scott vs. Brest, 2 T. R., 238.

Barden vs. Crocker, 10 Pick., 383.

Pilgrim vs. Mellor, 1 Ill. App. 448.

Oliphant vs. Smith, 3 P. & W. (Pa.), 180.

Gould on Pleading, 105.

Taylor vs. Cole, 3 T. R., 292.

Doulson vs. Mathews, 4 T. R., 503.

Livingston vs. Jefferson, Fed. Cas., 8411.

This rule has been uniformly applied to actions for the wrongful diversion of water in one county to the injury of land situated in another county.

"It may sometimes be a question as to what is the proper county in which to bring an action for the diversion of water, where the residence of the parties, or their respective properties, are in different counties. In this connection it should be noted that the cause of action for an interference with a water right acquired by prior appropriation, by the unlawful diversion of the water, consists not only in the wrongful diversion of the water, but also in the consequent injury to the prior appropriator. Neither the diversion alone nor the injury alone is sufficient to constitute a cause of action against the person diverting the water. The mere diversion of water gives the prior appropriator no right to complain so long as he receives all the water to which he is entitled. Likewise as to the injury, unless it be shown that it was caused by the diversion in question. The diversion of the water and the consequent injury constitute one cause of action. From this it follows that the cause of action may arise in two different counties, as where the defendant in one county diverts water to which the plaintiff is entitled for the irrigation of his land lying in another county. In such case the plaintiff may elect in which county he will bring his action. Similarly, where the plaintiff's irrigating ditch is located in two counties—the head of the ditch lying in one county, and the land to be irrigated lying in the other county—a cause of action for diverting the water from the stream above the head of the plaintiff's ditch arises in both counties, and the action for such diversion may therefore be brought in either county."

Long on Irrigation, sec. 109, pp. 207, 208.

This rule from the nature of things was first laid down and developed in connection with actions of a local nature where the property injured was situated in one county and the act complained of done in another county. The question early arose, however, as to the applicability of the rule

where the property was situated in one country or State and the act complained of was done in an adjoining country or State. One of the earliest cases in which the matter arose was the case of *Rundle vs. Delaware & R. Canal*, 1 Wall. Jur., 275; Fed. Cas 12139, decided by Mr. Justice Grier on circuit and affirmed without particular reference to this point by this court in 14 How., 80; 14 Law. Ed., 335. In that case an action was brought in the State of New Jersey for injuries done to real estate situated in Pennsylvania by a canal situated in New Jersey. After stating the general rule of the common law as to the venue in actions for acts done in one county causing injury in another, the court said:

"It has been objected to the application of this doctrine to the present case that it refers to counties which adjoin, and not to sovereign States. This is a distinction, it is true, between the cases cited and the present, but we have heard no reason given why it should make a difference. Actions may be maintained in the courts of New Jersey by a Pennsylvanian to recover a debt or damage for a personal injury; and why not for injury to real property? The answer must be because the action is local and not transitory. The difficulty is caused not by any principles of international law, but by the common law, which is the same in both States. By the common law then, it must be solved. The objection is founded not on the plaintiff's right to a remedy, but on the mode of trial; and is, after all, but an objection to the venire. But I have shown that the venire is well laid in New Jersey (which as regards this court forms one county), because the nuisance complained of was created in that State. If, then, the action be local and this its proper venue, what is the value of the distinction? The plea to the jurisdiction must therefore be overruled."

CASES HOLDING THAT COURTS OF A LOWER STATE HAVE JURISDICTION OF ACTS COMMITTED ON INTERSTATE STREAM IN UPPER STATE.

The case of *Rundle vs. Delaware & R. Canal, supra*, it will be remembered, was in reference to an interstate stream separating two independent States, but the question soon arose with reference to interstate streams running through two States and it has been universally held that the courts of the lower State have jurisdiction to enjoin a diversion in the upper State to the injury of rights in the lower State. The following cases leave little to be said on this subject:

Thayer vs. Brooks, 17 Ohio, 487.

Deseret Irrigation Co. vs. McIntyre (Utah), 52 Pac., 628.

73

Willey vs. Decker (Wyo.), 1 Pac., 210.

Taylor vs. Hewlett (Idaho), 97 Pac., 37; 19 L. R. A., N. S., 535.

California Development Co. vs. New Liverpool Salt Co., 172 Fed., 792.

Smith vs. Southern Railway Co. (Ky.), 123 S. W., 678.

In the case of *Thayer vs. Brooks, supra*, it appeared that plaintiff's mill was in Ohio and driven in part by a stream of water flowing from a swamp situated in Pennsylvania, and which swamp was in part upon land owned and possessed by defendant, who had cut a ditch across his farm in Pennsylvania by which the water was diverted from plaintiff's mill. The action was in case, and in sustaining the jurisdiction of the lower court the Supreme Court of Ohio said:

"The act was done in Pennsylvania; the injury which was occasioned by that act was sustained in Ohio. In such a case it is believed the suit would well lie in either State. When an injury has been

caused by an act done in one county to land situated in another, the venue may be had in either. Chitty, Pl., 299, and cases referred to."

Deseret Irrigation Co. vs. McIntyre, supra, was a case in Utah. By the constitution of that State jurisdiction was confined to the court of the county in which the cause of action arose. The action concerned water rights in Sevier River, a stream flowing through two counties, San Pete and Millard, and was brought in the lower county, Millard, in which the plaintiffs' canals were situated, and the plaintiffs sought an injunction against diversions in the upper county, San Pete. On objection to the jurisdiction it was held, for the same reasons here urged, that the plaintiffs might have brought the action in either county, and the jurisdiction was therefore sustained. The decision was based upon reasons thus stated by the court (pp. 629-630):

"If the injury be to real property, as a trespass, or waste, or the like, an action therefor will be local, and the plaintiff must declare his injury to have happened in the county and place where it did actually happen; and if the acts which caused the injury in one county were committed in another, or if the cause of action consists of two or more material facts which arose in different counties, the venue at common law may be laid in either. (Citing authorities.) So, many actions, in which it is not sought to directly recover real property, are local at the common law, because they arise by reason of some local right or interest, or out of some local subject, such as the common-law actions of waste, trespass *quare clausum fregit*, trespass on the case for injuries to things real, as for obstruction or diversion of ancient water-courses, nuisances, waste, &c., to houses, lands, water-courses, right of way, or other real property. * * * The general doctrine at common law, no doubt, is that an action for injury to real property, as trespass, or case for nuisance, is local and must be commenced within the county or district in which the land lies. Where, however, an act has been committed in one

county or district, which caused injury to realty in another, suit may be brought in either. In such case the cause of action may be said to have arisen in either county." (Citing authorities.)

Willey vs. Decker, supra, was an action brought in Wyoming by the claimants of certain water rights in Young's Creek, a stream rising in Montana and flowing into Wyoming. The complaint was similar to that in *Miller & Lux vs. Rickey*, and the relief asked was the same. The diversions by some of the defendants were being made in Montana, the law of Montana being similar to that in California, and the law in Wyoming similar to that in Nevada. It was held (pp. 224-5) that the court in Wyoming had jurisdiction to restrain the diversions in Montana for the same reasons as those hereinbefore argued under the present head.

Taylor vs. Hewlett was in the form of an action to quiet title to water appropriated in the State of Idaho as against parties claiming water from the stream in the State of Wyoming. It was held that the courts of Idaho had jurisdiction, and that in ascertaining and determining the rights of the plaintiff within the State of Idaho the court might ascertain and determine the rights of parties higher up the stream and in the State of Wyoming, and that such judgment would be binding upon persons claiming rights in the State of Wyoming and entitled to full faith and credit in the courts of the latter State.

California Development Co. vs. New Liverpool Salt Co., supra, was a suit for damages originally commenced in a State court of California and thence removed into the United States Circuit Court, where "the complaint was framed as a bill in equity in accordance with the practice of Federal courts" to restrain the California Development Company from so diverting the waters of the Colorado River by itself and affiliated corporations from both sides of the international boundary line to the resulting flowing of the lands

and property used by complainant in its business of mining, gathering and refining salt in the State of California. In an elaborate opinion containing full review of the authorities the United States Circuit Court of Appeals sustained the jurisdiction of the Circuit Court, saying (page 813):

"Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

A petition for writ of certiorari in that case was denied by this court (215 U. S., 603).

The latest case on the subject is the case of *Smith vs. Southern Railway Company*, *supra*, which was an action brought in the State of Kentucky to recover damages to a house situated in Tennessee caused by an explosion of dynamite in the State of Kentucky. After fully reviewing the authorities on the subject the court held that under such circumstances the action might be brought in either State, at the option of the plaintiff.

CASES HOLDING THAT COURTS OF THE UPPER STATE AT THE SUIT OF A PARTY INJURED IN THE LOWER STATE MAY GRANT THE NECESSARY RELIEF.

While the counsel for petitioner stoutly maintain that the stream is to be automatically cut in two at the State line, and that all rights in the stream in one State must be determined by the courts of that State and claims to see an absurdity in courts in Nevada determining the rights of parties in the State of California, they seem to see no difficulty in the

courts of California determining rights in the State of Nevada for the purpose of protecting those rights against invasion in the State of California. In fact, in order to maintain the position that the courts of Nevada have no jurisdiction of the case at bar, counsel are forced to cite with approval cases that hold that under identical circumstances the courts of California would not only have jurisdiction, but in the exercise of that jurisdiction would determine not only the rights of the defendants in the State of California, but would determine and protect the rights of the plaintiffs in the State of Nevada. These cases, to our mind, are diametrically opposed to the entire argument made by the petitioner.

The cases holding this doctrine, which is in entire accord with the doctrine contended for by us, are as follows:

Stillman vs. White Rock Mfg. Co., 3 Wood & M., 538, Fed. Cas., 13446.

Bannigan vs. Worcester, 30 Fed., 392.

Ducktown Sulphur, etc., Co. vs. Barnes (Tenn.), 60 S. W., 593, 606.

Howell vs. Johnson, 89 Fed., 556.

Morris vs. Bean, 123 Fed., 618.

Hoge vs. Eaton, 135 Fed., 411.

Anderson vs. Bassman, 140 Fed., 14.

Before leaving this subject it might be wise to make one further remark in regard to the closing paragraph of petitioner's brief (pages 50 to 51) where it is stated:

"If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decisions will be in conflict with the decisions of the California courts, on the rights in a stream in California, and there will ensue nothing but unseemly conflicts between courts."

"But let the law be as we here contend; let the Nevada appropriator have recourse to the courts of

Nevada to protect his rights in the stream in Nevada and to the courts of the State of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict."

This picture of strife and conflict on one side and peace and harmony on the other sounds very plausible in theory, but it will not stand a practical test, for in order that the State of California at the suit of a person claiming rights in the State of Nevada may grant the desired relief it must first determine and judge the rights of the plaintiff in the State of Nevada. If the rights claimed by the plaintiff are the rights of a riparian owner it may hold that such rights are entirely ineffectual as against an appropriator or riparian owner in the State of California, and the same conflict which petitioner appears to be so solicitous to avoid would be as inevitable as if the matter were determined by the courts of the State of Nevada. If the State of Nevada and the State of California were hostile, independent nations, having no tribunal other than the tribunal of force to determine their respective rights, there would necessarily be conflict over those rights, and so, where under our system the courts of two States have concurrent jurisdiction to determine the same matter, there may be different conclusions reached in different cases by the courts of the different States, but the matter is not improved by permitting the courts of the different States to reach contrary decisions, not only on the same general question, but on the same controversy between the same parties, and as we shall hereafter show, under our system that can only be avoided by permitting the court which first acquires jurisdiction of the subject-matter to retain that jurisdiction to the end, and then, so far as the parties to that litigation are concerned, there can be no conflict of jurisdiction or decision.

REMARKS ON CASES RELIED UPON BY PETITIONER.

Petitioner refers to very few authorities which it relies upon as laying down any rule opposed to the rule laid down in the many cases relied upon by us, and the few cases to which it does refer can readily be shown to be in entire accord with those cases.

One of the cases principally relied upon is the case of *Stillman vs. White Rock Mfg. Company*, 3 Wood & M., 538, Fed. Cas., 13, 446. The only thing decided in that case was that an action might be maintained in Rhode Island to abate a nuisance, namely a canal situated therein, which caused injury to lands in Connecticut. The court did not hold that an action could not be maintained elsewhere, but simply that that particular remedy could not be enforced in a suit brought elsewhere. This is the language of the court:

"Yet here *this remedy* must be sought in Rhode Island, or it would be of no use. The canal is situated there, which is made to divert the water. The owners of the canal, the supposed wrongdoers reside there and an injunction issuing in another State or circuit could not be executed there, it being a proceeding quasi *in rem*."

The court, however, showed that a different *form* of action might be maintained in the other State, saying:

"I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two States, though sometimes in different forms, at least, as here. Such is the case of theft continued from one State to another, or the felonious intent indicated in both, or a burglary in one State being a larceny in another, where the property was removed, but no house broken into. So if one fires a gun in one State which kills an individual in another State, there may be the offense of using a deadly weapon in the first State, and committing murder by the killing in the second

State. Again, there is sometimes an election in which to prosecute. Thus, if a blow be given in one county, and death follows in another, an appeal of murder lies in either. Dyer, 40; 4 Coke, 426; 7 Coke, 59. If two acts are necessary to constitute an offense, and one is done in one county, and one in another, the prosecution may be in either. So if "A" in one county injure land in another. *Bulwer's Case*, 7 Coke, 57; 3 Leon, 143; *Scott vs. Brest*, 2 Durn. & E. (Term R.), 238; *Mayor, etc., of London vs. Cole*, 7 Durn. & E. (Term R.), 583; 1 Chit. Pl., 299. So if one in the State of Ohio draw a bill to defraud and send it to New York by another, and thus commit or complete the fraud there, he can be punished there. *People vs. Adams*, 3 Denio, 190. And to remove all doubt by a reference to a case almost identical with this in principle:

'If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 Hen. IV, c. 8, or I may bring it in Middlesex, for there I have the damage.'

7 Coke, 60. It is rather remarkable, however, that a charge of witchcraft in one county of a person residing in another, created some embarrassment in Massachusetts at the close of the seventeenth century. 2 Hutch. Hist., 50. But the very case of a nuisance in one county to land in another is referred to in 7 Coke, 63, where a writ is said to lie in the former. So in Co. Litt., 154a; Fitzh. Nat. Brev., 183k."

Another case relied upon by petitioner is *Conant vs. Deep Creek Curlew Valley Irrigation Company*, 23 Utah, 627. That case was in the form of a suit brought in the State of Idaho to quiet title of the plaintiff to water in the State of Utah. The court held that such an action could not be maintained for the reason that the relief sought acted directly upon the title to the property and not merely *in personam* against the defendant. The following language of

the opinion will show that there is nothing in the case contrary to the cases relied upon by us:

"It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we cannot agree. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another State, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter State will protect the first settler in his rights. *Howell vs. Johnson* (C. C.), 89 Fed., 556. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto; and by the decree entered in the suit in the district court of Oneida county, Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law cannot be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this State, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this State, and in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit."

Another case relied upon by petitioner is *Lampson vs. Vaile*, 27 Colo., 201; 61 Pac., 231. That was an action, or more properly a special proceeding, brought in the State of Colorado under a special statute authorizing the formation of water districts in the State of Colorado and the determination of water rights in such district, and it was held simply upon the construction of that particular statute that it did not authorize the court to determine water rights situated entirely in the Territory of New Mexico. No question of general jurisprudence was discussed, but the decision was based entirely upon the peculiar language of the statute conferring jurisdiction on the court.

Another case relied upon is *Ducktown Sulphur, etc., Company vs. Barnes*, 60 S. W., 593. All that was held in that case was that an action to abate a nuisance, namely, a smelter situated in the State of Tennessee, might be maintained in that State at the suit of persons owning land damaged thereby and situated in the State of Georgia. Even if that case could be construed as holding that the action could not be maintained in the State of Tennessee, that is based entirely upon the peculiar relief asked, namely, the abatement of the nuisance. Relief, if granted in the State of Georgia, could not be enforced, and a court of equity will not put itself in the position of rendering a decree which it is impotent to enforce.

It will therefore be seen that so far as these cases can at all be held to decide that the particular actions involved therein could only be brought in the State where the act complained of was done, that was on account of the peculiar form of relief which was sought, namely, the actual abatement of a particular nuisance situated in such State; and without determining the correctness of those decisions it is obvious that they have no application to a case where such relief is not asked for. In other words, as pointed out by the Court of Appeals in the case of *California Development Company vs. New Liverpool Salt Company* (172 Fed., 792),

the jurisdiction of the court in an action simply for damages and an injunction cannot be affected by the fact "that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court."

Another case relied upon by petitioner, not only in this connection, but in connection with other points in the case, is *Northern Indiana Railway Company vs. Michigan Central Railway Company*, 15 How., 233. That was a suit in equity brought in the United States Circuit Court for the district of Michigan, to enjoin the defendant railroad from entering upon or using the lands of the complainant in the State of Indiana, and from hindering the complainant from completing and operating its road in that State. It will be noted that the complainant had no property right of any kind in the State in which the suit was commenced, and that the entire subject-matter of the suit was situated in another State, nor was there any equity of any kind existing between the parties requiring equitable interference, except the necessity of equitable relief on account of the inadequacy of the remedy at law. Such a case is so foreign to the questions in the case at bar that it would be presumptuous for us to argue the correctness or exact meaning and effect of that decision. In the case at bar the subject-matter of the action is the Walker river. The complainant and the defendants at most are tenants in common of that river. The largest part of the river itself is situated entirely within the State of Nevada. The lands of the complainant which are washed by the waters of that river are situated in the State of Nevada and the water claimed by the complainant was appropriated and diverted in that State and applied to beneficial use upon lands situated entirely therein, so that there is no possible analogy between that case and the *Northern Indiana Railway* case where none of the property or property rights involved was situated in the State where the action was commenced, and where the case would have

been governed by the same principles if it had been commenced in Oregon, New Mexico, or in a foreign country.

The last case relied upon by petitioner is the case of *Mississippi, etc., vs. Ward*, 2 Black, 485. That was in the nature of a proceeding *in rem* commenced in the United States District Court for the State of Iowa against a bridge situated partly in the State of Iowa and partly in the State of Illinois, for the purpose of having the bridge removed and abated as a nuisance. In denying the jurisdiction of the court to remove the bridge, so far as it was situated in the State of Illinois, the court placed its decision on the same ground as the Stillman case, namely, that on account of the peculiar remedy sought, and since the court had no power to enforce a decree granting such remedy, it had no jurisdiction.

These are all of the cases relied upon by petitioner and it is plain to see that none of them deny jurisdiction in a case like the case at bar, and none of them are in any way contrary to the cases relied upon by us.

III.

1. WHERE TWO COURTS HAVE CONCURRENT JURISDICTION THE FIRST COURT WHICH ACQUIRES JURISDICTION OF THE SUBJECT-MATTER IN CONTROVERSY WILL RETAIN THAT JURISDICTION TO THE END AND MAY ENJOIN THE PARTIES FROM PROSECUTING ANY OTHER SUIT IN ANY OTHER TRIBUNAL INVOLVING THE SAME ISSUES.

The doctrine that the court which first obtains jurisdiction of the *res* in controversy is entitled to dispose of the controversy without interference from another court, and that it may enjoin a party from meanwhile commencing or prosecuting against the other parties a suit with relation thereto in any other court, is well settled, and if the later suit raises

any issue which exists in the first suit its prosecution will be enjoined so far as it relates to that issue.

Prout vs. Starr, 188 U. S., 537.

Pitts vs. Rodgers, 104 Fed., 387.

Riverdale Cotton Mills vs. Alabama &c. Co., 111 Fed., 431.

Home Ins. Co. vs. Virginia &c. Co., 109 Fed., 681.

State Trust Co. vs. Kansas City &c. Co., 110 Fed., 10.

Central Trust Co. vs. Western &c. Co., 112 Fed., 471.

Mercantile &c. Co. v. Roanoke &c. Co., 109 Fed., 3.

Stewart vs. Wisconsin Cent. R. Co., 117 Fed., 782.

Starr vs. Chicago &c. Co., 110 Fed., 3.

Gage vs. Riverside Trust Co., 86 Fed., 984, 988.

2. SECTION 720 OF THE REVISED STATUTES DOES NOT PREVENT A COURT OF THE UNITED STATES WHICH HAS ACQUIRED JURISDICTION OF A PARTICULAR CONTROVERSY FROM ENJOINING THE PARTIES THERETO FROM PROSECUTING A SUBSEQUENT ACTION IN RELATION THERETO IN THE COURTS OF A STATE.

"Where a State court and a court of the United States may each take jurisdiction the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan vs. Lucas*, 10 Pet., 400; *Taylor vs. Carryl*, 20 How., 584; 15 L. Ed., 1028; *Troutman's Case*, 4 Zab., 634; *Ex parte Jenkins*, 2 Am. Law. Reg. 144. It is indeed a principle of universal jurisprudence that when jurisdiction has attached to *person or thing* it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

Taylor vs. Taintor, 16 Wall., 370.

French vs. Hay, 22 Wall., 253:

In this case a suit in equity had been brought in a State court to set aside a sale, for rents and profits, and to recover

possession of the property. A personal judgment was rendered for \$2,387.66. Thereafter the suit was removed to the United States Circuit Court and the judgment set aside. In the meantime the plaintiff in the original case brought a suit on this judgment in the State court. The defendant thereupon filed an auxiliary bill in the circuit court to enjoin the enforcement of this judgment. The injunction was granted and this was affirmed on appeal, the court saying:

"The court having jurisdiction *in personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. *Watts vs. Waddle*, 6 Pet., 391; *Lewis vs. Darling*, 16 How., 1. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive and could not be trespassed upon by any other tribunal. *Hagan vs. Lucas*, 10 Pet., 400; *Taylor vs. Carryl*, 20 How., 583 (61 U. S., XV, 1928); *Freeman vs. Howe*, 24 How., 450 (65 U. S., XVI, 749); *Taylor vs. Taintor*, 16 Wall., 370 (83 U. S., XXI, 290).

* * * * *

"The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

Dietsch vs. Huidekoper, 103 U. S., 494:

In this case after a case at law was removed into the Federal court the State court proceeded to judgment and a suit was thereupon brought in the State court on the replevin bond. Thereupon a bill in equity was filed to enjoin the

prosecution of such suit. The injunction was granted and sustained, the court saying:

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

Ex parte Sawyer, 124 U. S., 200:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

Freeman vs. Howe, 24 How., 450:

"A bill filed on the equity side of the Circuit Court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under *mesne* or final process, is not an original suit, but auxiliary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

Hardraker vs. Wadley, 172 U. S., 148:

"When a State court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted."

The court cited with apparent approval the following cases:

French vs. Hay, 22 Wall., 253;

Dietsch vs. Huidekoper, 103 U. S., 494;

Re Sawyer, 124 U. S., 200;

York vs. Pilkington, 2 Atk., 302,

and approved the view that section 720 of the Revised Statutes is subject to section 716 as construed in the cases above referred to.

3. WHERE A COURT OF EQUITY HAS ACQUIRED JURISDICTION BY REASON OF ITS JURISDICTION OVER PROPERTY WITHIN THE TERRITORIAL JURISDICTION OF THE COURT, OR BY REASON OF ITS JURISDICTION OF PARTIES RESIDING WITHIN ITS JURISDICTION AND AGAINST WHOM AN EQUITABLE CAUSE OF ACTION EXISTS, GROWING OUT OF FRAUD, TRUST, CONTRACT, OR OTHER BASIS OF EQUITABLE JURISDICTION, IT MAY RETAIN JURISDICTION AND GIVE COMPLETE RELIEF, ALTHOUGH IT MAY BE NECESSARY IN SO DOING TO PASS UPON RIGHTS TO PROPERTY SITUATED IN ANOTHER STATE OR COUNTRY.

This rule has been established and followed in a great variety of cases, of which the following are conspicuous examples:

Great Falls Mfg. Co. vs. Worden, 23 N. H., 462:

Suit in New Hampshire to enjoin the destruction of the portion of a dam situated in Maine, the other half thereof being situated in New Hampshire.

Schmaltz vs. York Mfg. Co., 204 Pa. St., 1:

Suit to enjoin a person who had sold a refrigerator plant from removing the same when it had become attached to realty in another State.

Alexander vs. Tolleston Club, 106 Ill., 65:

Suit to enjoin defendant from interfering with a right of way granted by defendant in another State.

Williams vs. Aggsault, 31 Barb., 364:

Action to cancel a mortgage which is a lien on property in another State on the ground that the mortgage was void for usury.

Manley vs. Carter (Kans.), 52 Pac., 915:

Action to enforce a trust as to property situated in another State.

Willey vs. St. Charles Hotel Co., 52 Pac. (La.), 182, 187:

In marshalling assets court considered property situated in another State.

Clad vs. Poist, 181 Pa. St., 148:

Action to enjoin interference with a boulevard laid out by defendant situated in another State.

Remer vs. McKay, 54 Fed., 432, 434:

Suit to declare void a judgment and to remove it as cloud upon land in another State.

Mossie vs. Watts, 6 Cr., 148:

Action to charge defendant as trustee in respect to certain lands in another State alleged to have been obtained by fraud.

Muller vs. Downs, 94 U. S., 444:

Suit by trustee to foreclose mortgages of a railroad situated in two States. The court ordered the entire property sold by the master, and directed a conveyance by him, also by the trustee and the railroad. The decree was upheld, the court saying (page 449):

"If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted; and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State, it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another juris-

diction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath vs. R. R. Co.*, 55 Pa., 189, a bill for foreclosure of a mortgage, in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

Phelps vs. McDonald, 99 U. S., 298:

In this case the defendant, a bankrupt, being the owner of a claim against the British Government, had the claim sold by the trustee in bankruptcy and then conveyed to him for \$20. The claim was allowed for \$187,190. In sustaining the jurisdiction of the court to reach the fund, although situated in a foreign country, the court said (page 308):

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could

do voluntarily, to give full effect to the decree against him.

"Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*."

Cole vs. Cunningham, 133 U. S., 107:

In this case a resident of Massachusetts was enjoined from prosecuting attachment suits in New York against property of an insolvent debtor, which were instituted for the purpose of obtaining a preference forbidden by the laws of the State of Massachusetts.

The injunction was granted

"on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience, and that, as the decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

* * * * *

"The defendants, being citizens of this State, are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws are intended to secure."

The court based its decision on the following authorities:

1. *Penn vs. Lord Baltimore*, 1 Ves. Sr., 444,

in which—

"Lord Hardwicke recognized the principle that equity, as it acts primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity

subsisting between the parties, respecting property situated out of the jurisdiction."

2. *Pennoyer vs. Neff*, 95 U. S., 714,

where Mr. Justice Field stated that persons could be compelled to make conveyances

"In pursuance of their contracts respecting property elsewhere situated."

3. *Lord Partarlington vs. Soulby*, 3 Myl. & K., 104,

where Lord Chancellor Broughton placed the power to enjoin suits in a foreign jurisdiction

"on the circumstance of the person of the party on whom the order is made, being within the power of the court."

4. *Story's Equity Jur.*, secs. 899, 900,

where the rule is broadly stated that the courts

"consider the equities between the parties, and decree *in personam* according to those equities" and "as the ends of justice may require."

5. *Snook vs. Snetzer*, 25 Oh. St., 516;

Keyser vs. Rice, 47 Md., 203;

Burlington & M. R. R. Co. vs. Thompson, 31 Kan., 180;

Kidder vs. Tufts, 48 N. H., 121;

Wilson vs. Joseph, 107 Ind., 490,

holding that a citizen of a State might be enjoined from attaching the debtor's property in another State for the purpose of evading the exemption law of the State of his domicile.

6. *Tail vs. Knapp*, 49 Barb., 299,

where citizens of New York were enjoined from continuing attachment suits in Vermont upon the ground that they were proceeding in Vermont in evasion of the laws of New York.

7. *Dinsmore vs. Neresheimer*, 32 Hun., 204,

where a resident was enjoined from prosecuting an action in the District of Columbia

"to avoid a decision of the Court of Appeals of New York, differing from the rule upon the same subject in the District of Columbia."

Erie R. Co. vs. Ramsey, 45 N. Y., 637, to the same effect.

8. *Sercomb vs. Cathin*, 128 Ill., 556:

To the effect that the courts of Illinois on the application of a receiver appointed by them could enjoin a person within the jurisdiction of the court from interfering in respect to property belonging to an insolvent co-partnership of which the receiver had been appointed, although that property was outside of the jurisdiction.

9. *Dehorn vs. Foster*, 4 Allen, 545:

In which

"Bigelow, Ch. J., points out that the jurisdiction of a court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits upon a proper case made either in the courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that as a decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting this action in the courts of another State or country."

Moran vs. Sturges, 154 U. S., 286:

In this case the State court had appointed a receiver, but before he had qualified or taken possession of the property the United States marshal took possession under a maritime libel. The State court undertook to enjoin the prosecution of the libel, but the court held that the possession of the marshal having attached before the State court took possession, the libel might proceed. In holding, however, that if the State court had actually obtained possession before the institution of the libel it would have been proper to have enjoined the prosecution of the libel, the court fully reviewed the authorities to the following effect:

1. In regard to the cases of *French vs. Hay*, 89 U. S., 250 (where after a removal of the cause to the Federal courts a suit was instituted on a decree rendered before the removal), and *Providence, etc. Co. vs. Hill Mfg. Co.*, 109 U. S., 578 (where suits were enjoined under proceedings for limitation of liability), the court said:

"These were all cases in which the issue of an injunction to a State court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a court of the United States of its lawful jurisdiction over particular persons or things."

2. It cited with approval the case of *Gaylord vs. Ft. Wayne M. & C. R. Co.*, 6 Biss., 286, where it is stated:

"We think that there is no other safe rule to adopt in our mixed system of State and Federal jurisprudence than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled."

3. It cited with apparent approval the case of *Home Insurance Co. vs. Howell*, 24 N. J. Eq., 238, where a suit had been instituted to cancel insurance policies and the court

enjoined an action brought in another State on the policies, and in which it was said:

"When a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may by the ordinary process of injunction and attachment for contempt compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court."

4. It approved the case of *Cole vs. Cunningham*, 133 U. S., 107, *supra*, but pointed out that the jurisdiction exercised in that case against a resident of the State in which the insolvency proceedings were pending would not be exercised against a non-resident who was not bound by the laws of the State in which such proceedings were instituted, citing *Reynolds vs. Adden*, 136 U. S., 348; *Worthington vs. Lee*, 61 Md., 530.

5. In regard to *Gaylord vs. Ft. Wayne, etc., Co.*, 6 Biss., 286, and *Home Ins. Co. vs. Howell*, 24 N. J. Eq., 238, *supra*, the court said:

"It will be perceived that the principle invoked in such cases as *Gaylord vs. Ft. Wayne, etc., Co.* and *Home Ins. Co. vs. Howell*, *supra*, is that courts for the purpose of protecting their jurisdiction over persons and subject-matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession, or identical controversies therein pending, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction."

6. Mr. Justice Brewer, in concurring as to the general principle involved, but dissenting as to its application in this particular case, said:

"I agree that it is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court; and I may say that I agree further that where a court has possession of property it may restrain the bringing of any suit in any other court to disturb that possession, and that an order for such restraint operates upon all persons within its jurisdiction and can be enforced, if need be, by proceedings as for a contempt."

Dull vs. Blackman, 169 U. S., 243:

In this case the court stated that where a court of one State had jurisdiction of the parties it might *in effect* quiet title to land in another State.

Fall vs. Eastin, 215 U. S., 1:

In this case it was held that while a decree compelling the conveyance of land in another State did not *ipso facto* act upon the title, it was binding upon the parties.

Counsel seem to think that we contend broadly that a court of equity would have authority to enjoin an injury to property situated entirely in another State, although there was no relation of trust, fraud, contract, or other equity between the parties, and the only ground of equitable relief was the nature of the relief sought. Such was the case of *Northern Indiana R. Co. vs. Mich. Cent. R. Co.*, 15 How., 233. We make no such broad claim, nor is any such position necessary in this case. What we do claim is that when the court, as in this case, has undoubted jurisdiction over property within the State, it may consider rights in prop-

erty out of the State in order to do complete justice between the parties, just as this court affirmed a decree of a court in one State directing the sale of a railroad situated in two States.

Muller vs. Downs, 94 U. S., 444, *supra*.

Owners on a stream are tenants in common of the stream, and equity has complete jurisdiction to determine and regulate their respective rights.

17 Am. & Eng. Ency. of Law (2d ed.), 70.

CONCLUSION.

In presenting this case we have done so on the theory of the petitioner that the wrongful acts alleged to have been committed by Rickey were committed entirely in the State of California, but we believe that it could be strongly argued that those acts were committed in Nevada as well as in California. The complaint in the original case of *Miller & Lux vs. Rickey*, after alleging the rights of the complainant, alleges that the defendant is diverting and threatens to divert water from the river above the lands and canals of the complainant so as to deprive complainant of the water to which it is entitled. To this the defendant Rickey pleads that he is diverting and using all the water diverted and used by him entirely in the State of California. In considering the effect of this plea it should be remembered that a riparian owner in the State of California has a legal right to divert the water within the State of California, provided it is returned to the stream before reaching another party entitled to the water. In other words, the right of the complainant, Miller & Lux, is to have the water reach its lands and points of diversion in the State of Nevada, and the wrong complained of is that the water, by reason of the acts of the defendant, does not flow to that point. The act of the defendant therefore would never become

wrongful, provided the water was returned to the river at any time before reaching the land of the complainant, and therefore the act complained of is not only the physical diversion of the water in the State of Nevada, but his act in continually keeping the water out of the channel of the river through the State of California and the State of Nevada to the land of complainant.

In this connection the inconsistency of the position of the petitioner should not be overlooked. In the suit filed by petitioner in the State of California it is claimed that the petitioner is the owner of the right to divert over fifteen hundred cubic feet of water flowing per second from the Walker River, and it seeks by that suit to have its title and right thereto quieted as against Miller & Lux, a riparian owner and appropriator entirely in the State of Nevada. It cannot be assumed that that suit was brought without any useful purpose, and it must be assumed that petitioner expects that the courts of California in that case will adjudge that the petitioner has the right therein claimed, and that the court will quiet its title thereto as against Miller & Lux, the Nevada riparian owner and appropriator. In order to do so it must necessarily not only determine the right of the petitioner, but likewise the absence of any right in Miller & Lux which is in any way inconsistent with the right of the petitioner. Petitioner urges in all stages of the argument that water rights have a definite *situs*, and that the *situs* of its water rights is the State of California. Assuming this to be true, it must be equally true that the *situs* of the water rights of Miller & Lux is the State of Nevada, and it is difficult to see how it can be contended that a court of the State of California may, in protecting water rights in that State, determine rights having a *situs* in the State of Nevada, but that courts of Nevada, in protecting rights having a *situs* in that State, are unable to pass upon conflicting rights having a *situs* in the State of California.

It must therefore be clear that, whether water rights have

or have not a definite *situs*, the courts of each State through which the stream flows have concurrent jurisdiction to determine such rights.

In the same connection, the Court should not overlook the obvious fact that the action in the State of California was brought for no purpose other than that of interfering with the jurisdiction already acquired by the United States Circuit Court of the District of Nevada. Rickey is an upper riparian owner and could in no way be injured by any adverse claim made by Miller & Lux, a lower riparian owner and appropriator. A diversion or appropriation by Miller & Lux below the land of Rickey would not be adverse to him and could never ripen into a proscriptive right as against him. In fact, some courts have gone so far as to hold that an upper riparian owner can maintain no action of any kind as against a lower appropriator.

Stockport Waterworks Co. v. Potter, 3 H. & C., 326.

Larimer & etc. Co. v. Water Supply etc. Co., 7 Colo. App., 225.

Chapman v. Copeland, 55 Miss., 478.

Without taking this advanced position, it must be obvious that by the institution of that suit Rickey had no thought of righting any wrong committed by the defendants or any wrong which they were in a position to possibly commit, but that the same was instituted for the mere purpose of interfering with the prior jurisdiction of the United States courts.

We therefore respectfully submit that complainant's land and water right are situated in the State of Nevada; that defendant's acts, whether committed in the State of California or in the State of Nevada, have injured property situated in the State of Nevada; that a court of Nevada has jurisdiction to protect property within its jurisdiction from such injury; that in exercising that jurisdiction it must necessarily have power not only to determine the right of the complainant in the State of Nevada, but if the defendant

by way of defense sets up conflicting rights in the stream in the State of California the court has like power to adjudicate such rights, and having acquired jurisdiction to adjudicate such rights will enjoin the defendant from seeking an adjudication thereof in an action subsequently commenced in another jurisdiction. The Circuit Court of Appeals has clearly and correctly so ruled. We submit the decree should be affirmed.

EDWARD F. TREADWELL,
Solicitor for Complainant.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

(21,056.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Order extending time to docket cause	1	1
Transcript from the circuit court of the United States for the district of Nevada	2	1
Bill of complaint.. ..	2	1
Subpoena	22	11
Marshal's return.....	23	11
Order to show cause why injunction <i>pendente lite</i> should not issue.	25	12
Affidavit of Thomas B. Rickey.....	27	13
Charles Rickey	38	18
Alice B. Rickey	41	19
Order for injunction <i>pendente lite</i>	44	20
Petition for appeal	46	21
Assignment of errors.....	48	22
Order for appeal	59	27
Bond on appeal.....	60	28
Clerk's certificate to transcript	63	29
Citation on appeal.....	63	29

	Original.	Print.
Certificate of clerk of U. S. circuit court of appeals to printed transcript.	66	30
Caption to proceedings in U. S. circuit court of appeals.	67	31
Order of submission.	68	31
Opinion.	69	32
Decree.	78	35
Order denying petition for rehearing.	79	36
Certificate of clerk of U. S. circuit court of appeals.	80	36
Writ of certiorari.	81	37
Stipulation as to return to writ of certiorari.	83	38
Return to writ of certiorari.	86	39

a

No. 1365.

United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER and
CHARLES JOHNSTON, Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District
of Nevada.

1 In the United States Circuit Court of Appeals, Ninth Circuit
HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER and
CHARLES JOHNSTON, Complainants,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

Order Extending Time to Docket Cause.

Good cause therefor appearing, it is hereby ordered that the time
wherein defendant and appellant in the above-entitled action may
file the record thereof and docket the case with the clerk of this
Court, at San Francisco, California, may be enlarged and extended,
so as to extend to and include the 23d day of September, 1906,
and it is so ordered.

Dated this 22d day of August, 1906.

WM. W. MORROW, *Circuit Judge.*

[Endorsed]: No. 1365. In the United States Circuit Court of
Appeals, Ninth Circuit, District of California. Henry Wood et al.,
Complainants, vs. The Rickey Land and Cattle Company, a Corpo-
ration, Defendant. Order Extending Time. Filed Aug. 24, 1906.
F. D. Monekton, Clerk. Refiled Aug. 29, 1906. F. D. Monekton,
Clerk.

2 In the Circuit Court of the United States for the District of
Nevada.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER and CHARLES
JOHNSTON, Complainants,
vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the
District of Nevada:

Henry Wood, J. O. Birmingham, Charles Snyder and Charles
Johnston, of Lyon County, Nevada, and citizens of the State of Ne-

vada, bring this their bill against the Rickey Land and Water Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the county of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada; and thereupon your orators complain and say:

1. That your orators are citizens of the State of Nevada, and reside in Lyon County, Nevada, and within the District of Nevada.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the said State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

3. That on the 10th day of June, 1902, Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, exhibited to and filed in this court its bill of complaint against one Thomas B. Rickey, and against your orators and against many other persons, which suit is numbered 731 on the equity docket of this court.

4. That thereafter, on the said 10th day of June, 1902, this Court duly issued its writ of Subpœna in said suit upon said bill of complaint, directed to the said Thomas B. Rickey, your orators, and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpœna was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon your orators and upon the other defendants in said suit.

5. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this court his plea to the jurisdiction of said court, which plea was overruled by this

4 Court, and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint, and he has answered the same.

6. That your orators and the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this court as to all of the defendants thereto.

7. That in and by the said bill of complaint the said Miller & Lux (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seized in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said district of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed, and stream of said river; and further alleged that, at divers times therein set forth, the said Miller & Lux, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all

to a flow of nine hundred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same from said river to and upon certain lands and used the same for the irrigation thereof, and that the said Miller

5 & Lux was then the owner of such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that, within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey and your orators, had, and that each of them had, diverted the waters of said Walker river at divers places on said river above the said lands of the said Miller & Lux, and above the points at which the said Miller & Lux so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving the said Miller & Lux of a large portion of said water to which the said Miller & Lux is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same, under claim of right so to do, and adversely to the said Miller & Lux, and further alleged that, by the diversions aforesaid, the said Miller & Lux has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable and so long as said diversions are continued will be unable, to irrigate its said lands which it had

6 theretofore been accustomed to irrigate, and is thereby rendered unable and will *be* unable to properly or successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit or either of them has any right to divert any water from said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by the said Miller & Lux, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of the said Miller & Lux so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars (\$2,000).

8. That, in and by the said bill of complaint, the said Miller & Lux, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey and your orators, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said Miller & Lux so diverts the same, in such manner or to such extent as to deprive your orator of any of the water aforesaid, and also for general relief.

9. That thereafter, to wit, on the 6th day of August, 1902, and after the filing of the said bill of complaint, and after the service upon the said Thomas B. Rickey of the writ of subpoena in said suit,

7 and after the said Thomas B. Rickey had appeared therein, the said Thomas B. Rickey caused the defendant, the Rickey Land and Water Company, to be organized and incorporated and it was, on that day, organized and incorporated under the laws of the State of Nevada.

10. Upon and according to their information and belief, your orators aver that the only person really interested in said corporation defendant, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey, and hold their said stock solely for him and for his benefit.

11. That, as your orators are informed and believe, the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do.

12. That after the said incorporation and organization of the said Rickey Land and Cattle Company, the defendant herein, the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to
8 divert any water from the said Walker River; and the said defendant corporation has ever since claimed to be the owner of said lands and water rights.

13. That thereafter, to wit, on the 15th day of October, 1904, the said defendant, the Rickey Land and Cattle Company, commenced an action in the Superior Court of the County of Mono, State of California, against your orators and against a large number of other persons, which action is numbered 1053 on the register of said Superior Court.

14. That said action was commenced by said defendants, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and had been since the 6th day of August, 1902, the owner, in possession and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous bond of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner, in the possession of, and en-
9 titled to the possession, use and enjoyment of, and has the

right to divert and appropriate all the waters of the said West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have

their source in the State of California, and from thence flow through the eastern part of the said State of California, into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claim some right, title and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River, that said right, title and interest so claimed by said defendants and each of them, including your orators, in and to said water is without right, and that all claims of them and each of them to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second.

15. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use and enjoyment, of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said Court further adjudged that neither of the defendants therein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said West Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orators, are estopped to claim or assert against the defendant herein (plaintiff therein),

its grantees, successors, or assigns, any right, title, claim, interest or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and also for general relief.

16. That, on the said 15th day of October, 1904, the defendant herein, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against your orators and against a large number of other persons, which action is numbered 1056 on the register of said court.

17. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of the rest of the lands

aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constitute one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant

12 (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flows through the eastern part of the said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claim some right, title, and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River; that said right, title, and interest so claimed by said defendants and each of them, including your orators, in and to said water is without right, and that all claims of them and each of

them to the waters of said East Fork of said Walker River
13 are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second.

18. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and that said Court further adjudged that neither of the defendants herein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them,

including your orators, are estopped to claim or assert against the defendant herein (plaintiff therein) its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any
14 of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second; and also for general relief.

19. That, on the 20th day of December, 1904, your orators, the said Henry Wood, J. O. Birmingham and Charles Snyder filed in this court, in the said suit so brought by the said Miller & Lux against the said Thomas B. Rickey and others, No. 731, their cross-bill; in and by which cross-bill the said cross-complainants alleged, among other things, that they were, and for a long time prior thereto had been, the owners of certain rights in the waters of the said Walker River, and certain appropriations therein made by them, their grantors and predecessors in interest, and further alleged that, within three years next before the filing of said cross-bill, said Thomas B. Rickey had diverted the waters of said Walker River at divers places on said river above the lands of said cross-complainants, and above the points at which said cross-complainants so diverted the same; that a large proportion of said water so diverted by the said Thomas B. Rickey is never returned to said river, and that he is continuing the diversions aforesaid, and has thereby deprived and is depriving the said cross-complainants of a large portion of said water to which they are so entitled; that each of
15 said diversions so made by the said Thomas B. Rickey is without right, but that he has so diverted said water and is so diverting the same under claim of right so to do, and adversely to said cross-complainants; and therein and thereby the said cross-complainants prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said cross-complainants so divert the same, in such manner or to such extent as to deprive said cross-complainants of any of the water aforesaid; and also for general relief.

20. That, on the 20th day of December, 1904, your orator Charles Johnston, filed in this court, in the said suit so brought by the said Miller & Lux against the said Thomas B. Rickey and others, No. 731, his cross-bill, in and by which cross-bill the said cross-complainant alleged, among other things, that he was, and for a long time prior thereto had been, the owner of certain rights in the waters of the said Walker River, and certain appropriations therein made by him, his grantors and predecessors in interest; and further alleged that, within three years next before the filing of said cross-bill, the said Thomas B. Rickey had diverted the waters of said Walker River at divers places on said river above the lands of said cross-complainant, and above the point at which said cross-complainant so diverted the same; that a large proportion of said water so diverted by the said Thomas B. Rickey is never returned to said
16 river, and that he is continuing the diversions aforesaid, and has

thereby deprived and is depriving the said cross-complainant of a large portion of said water to which he is so entitled; that each of said diversions so made by the said Thomas B. Rickey is without right, but that he has so diverted said water and is so diverting the same under claim of right so to do, and adversely to said cross-complainant; and therein and thereby the said cross-complainant prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said cross-complainant so diverted the same, in such manner or to such extent as to deprive said cross-complainant of any of the water aforesaid; and also for general relief.

21. That thereafter, on the said 20th day of December, 1904, this Court duly issued its writ of subpoena in said cross-suits upon said cross-bills, directed to the said Thomas B. Rickey; and thereafter, on the said 20th day of December, 1904, the said writs of subpoena were duly served by the marshal of this district upon said Thomas B. Rickey.

22. That, upon the filing of said two complaints in said Superior Court, there was issued out of said Court in each of said actions a writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 26th day of December, 1904, and after the service of the said writs of subpoena upon the said Thomas B. Rickey, the said writs of summons were served upon your orators and upon each of them.

23. That by the laws of the State of California an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the Court in which such complaint is filed.

24. That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orators, and said other persons are, so far as concerns your orators, the same issues which were tendered by the said cross-bills of complaint of your orators so filed in this Court, so far as the same related to the defendant, Thomas B. Rickey, in said suits.

25. That, at the time of the filing by the defendant herein of its complaints aforesaid, the said defendant did not have or claim to have, and does not now have or claim to have, any right whatever in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey.

26. That the defendant herein, in and by the actions aforesaid, intended, and the necessary effect of said action is, to bring on for trial and determination in said Superior Court the same issues presented by the said cross-bill of complaint of your orators in the said suit so brought in this court, so far as relates to the issues between your orators and the said Thomas B. Rickey, and to obtain from

said Superior Court a judgment determining said issues in advance of a determination of the same by this court, and thereby to defeat the jurisdiction of this court in the said suit so now pending before it, and to hinder and embarrass this court in the trial of said issues, and in the enforcement of any decree which this court may render in the said suit so pending before it; and further prosecution of said actions, or either of them, as against your orators would therefore be in derogation of the jurisdiction of this court and of the rights of your orators in the cross-suits so brought by them in this court, and now pending therein.

27. That the matter in dispute herein, to wit, the right of your orators to maintain their cross-suits aforesaid without hindrance from or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand dollars (\$2,000).

19 And your orators allege that all of the said acts, doings and claims of the said defendant herein are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orators may have that relief which they can attain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, and that the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from further prosecuting, as against your orators, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions against your orators, and that your orators may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orators a writ of subpoena, to be directed to said defendant, the Rickey Land and Cattle Company, a corporation, commanding it, at a certain
20 time, and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, direction, and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from further prosecuting, as against your orators, either of the said actions so brought by it in the said Superior Court of the County of Mono,

State of California, and from taking any further step whatsoever in either of said actions as against your orators.

And may it further please your Honors to make and issue an order requiring the said defendants, the Rickey Land and Cattle Company, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction pendente lite, as above prayed for, should not be issued; and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants
 21 and attorneys, and all persons acting in aid of them or either of them, until the hearing of such order to show cause, and until the further order of this Court, from doing all or any of the acts aforesaid.

HENRY WOOD,
 J. O. BIRMINGHAM,
 CHARLES SNYDER,
 CHARLES JOHNSTON,
Complainants.

A. M. KIDD,
Solicitor for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Alexander M. Kidd, being duly sworn, deposes and says, that he is the solicitor for the complainants above named; that said complainants are at a considerable distance from the court, and their verifications cannot be obtained in time; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes the same to be true.

ALEXANDER M. KIDD.

Subscribed and sworn to before me this 3d day of January, 1905.

[SEAL.]

EUGENE W. LEVY,
*Notary Public in and for the City and County
 of San Francisco, State of California.*

22 [Endorsed]: No. 790. In Equity. Circuit Court of the United States for the District of Nevada. Henry Wood et al., Complainants, vs. Rickey Land & Cattle Company, Defendant. Bill of Complaint. Filed January 4th, 1905. T. J. Edwards, Clerk. A. M. Kidd, 124 Sansome Street, San Francisco, Cal., Solicitor for Complainants.

Subpoena ad Respondendum.

DISTRICT OF NEVADA, ss:

The President of the United States of America, to the Rickey Land and Cattle Company, a Corporation, Greeting:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States,*for the District of Nevada, in the Ninth Judicial Circuit, on the 6th day of February, 1905, to answer unto a bill of complaint exhibited against you in said court by Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston; and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, hereunto
23 affixed, at Carson City, Nevada, on this 4th day of January, 1905, and of the year of the Independence of the United States the 129th.

Attest:

[SEAL.]

T. J. EDWARDS, Clerk.

A. M. KIDD,

Solicitor for Complainant.

Memorandum:—The defendant is to enter its appearance in the above mentioned suit, in the clerk's office at Carson City, Nevada (Federal Building), on or before the day at which the above subpoena is returnable, otherwise the bill may be taken pro confesso.

T. J. EDWARDS, Clerk.

United States District Court, District of Nevada.

No. 790.

HENRY WOOD, JAMES BIRMINGHAM, CHAS. SNYDER, AND CHAS.
JOHN-TON

vs.

THE RICKEY LAND AND CATTLE CO., a Corp'n.

Return.

I certify and return that I received the within and hereto annexed
"Subpoena to appear and answer complainant's bill," on the 4th day
of January, 1905, together with a certified copy of order to
24 show cause; also certified copy of complaint, in the above-
entitled case, and personally executed same on Thos. B.
Rickey, of Carson City, Nevada, on the 5th day of January, 1905,
by exhibiting to said Thos. B. Rickey the original of said subpoena,
and leaving in his possession a copy thereof, together with said cer-

tified copy of order to show cause and also said certified copy of complaint.

Dated Carson City, Nevada, January 5, 1905.

Fees, 2 services, \$8.00.

ROBERT GRIMMON, *U. S. Marshal*.

[Endorsed]: No. 790. U. S. Circuit Court, District of Nevada. Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnston, vs. The Rickey Land & Cattle Company, Corporation. Subpoena to Appear and Answer Complainants' Bill. Filed on Return, January 5, 1905. T. J. Edwards, Clerk.

25 In the Circuit Court of the United States for the District of Nevada.

No. 790.

HENRY WOOD, J. C. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order to Show Cause Why Injunction Pendente Lite Should not Issue.

Good cause appearing therefor, by the verified bill of complaint of Henry Wood, J. O. Birmingham, Charles Snyder, and Charles Johnston, complainants, on file herein, it is ordered that the said defendant, the Rickey Land and Cattle Company, a corporation, show cause before this court, on the 13th day of March, 1905, at the hour of ten o'clock A. M., at the courtroom of this court at Carson City, Nevada, why an injunction should not issue pending this suit, according to the prayer of said bill.

And it further appearing to the Court that there is danger of irreparable injury from delay, it is therefore further ordered that,

26 until the hearing and determination of said motion for injunction and until the further order of this Court the said defendant, Rickey Land and Cattle Company, a corporation, its agents, servants and attorneys and all persons acting in aid of them or either of them, be and they are hereby enjoined and restrained from further prosecuting, as against said complainants, either of the two certain actions brought on the 15th day of October, 1904, by the said Rickey Land and Cattle Company, as plaintiff, against Miller & Lux, a corporation, said complainants, and others, as defendants, in the Superior Court of the County of Mono, State of California, and respectively numbered on the register of said Superior Court, 1055 and 1056.

And it is further ordered that a copy of this order be served upon the said corporation defendant, and on one of its attorneys (namely,

on either Mr. James F. Peck, or Mr. Charles C. Boynton, or Mr. William O. Parker), on or before the 30th day of January, 1905.

THOMAS P. HAWLEY, *Judge.*

[Endorsed]: No. 790. Circuit Court of the United States for the District of Nevada. Henry Wood et al., Complainants, vs. Rickey Land & Cattle Company, Defendant. Order to show Cause Why Injunction Pendente Lite Should not Issue. Filed January 4th, 1905. T. J. Edwards, Clerk.

27 In the Circuit Court of the United States, Ninth Circuit,
District of Nevada.

No. 790.

HENRY WOOD ET AL., Complainants,

vs.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Affidavit of Thomas B. Rickey.

STATE OF NEVADA,

County of Ormsby, ss:

Thomas B. Rickey, being duly sworn, deposes and says: That he is one of the defendants in the bill of complaint in the action commenced herein, No. 731, wherein Miller & Lux, a corporation, is complainant, and Thomas B. Rickey and others, are defendants; and that he is, and since its organization has been, the president of the Rickey Land and Cattle Company, a corporation, defendant herein; that he is not now, nor has he at any time since the organization of said corporation, been the manager of said corporation; that the manager of said corporation is, and at all times since the organization has been, one Charles Rickey, and that the active management of the said corporation and its affairs has been conducted by the said Charles Rickey.

28 It is provided by the laws of the State of California, in section 738 of the Code of Civil Procedure of said State, as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

That under the laws of the State of California, a person or corporation may commence and prosecute an action to final judgment in the Superior Court of said State to quiet and determine his or its title to real estate and water, and the use of water, flowing in the streams in said State, against any person or corporation claiming an adverse interest or title to such real estate, or to such water, or to such use of water.

That the Rickey Land and Cattle Company, a corporation, was organized on the 24th day of July, 1902, by Thomas B. Rickey, the affiant, Charles W. Rickey and Alice B. Rickey, who were the incorporators and subscribers to the capital stock of said corporation; and the said corporation was not organized on the 6th day of August, 1902, by the affiant, and was at no time organized by the affiant, except in so far as he participated with those associated with him in the organization of said corporation. That the purposes for which said Rickey Land and Cattle Company was organized were: "To buy and sell and own and to reclaim farm and graze lands; to locate and buy and sell water and water rights, and to use the same for irrigation and mechanical purposes; to build and construct dams and reservoirs and to store water therein for the purposes of irrigation and distribution and sale; to buy and sell and raise all kinds of livestock, hay and grain, and to do all kinds of farming business and to engage in all kinds of agricultural and dairy pursuits and business, and to engage in and to do a general merchandizing business, all in the States of California, Nevada and elsewhere." That pursuant to the purposes expressed in said articles of incorporation the said corporation acquired by conveyance certain lands and certain water rights of said Thomas B. Rickey, the affiant, on the 6th day of August, 1902, part of which said lands are described in the complaints in said suits commenced in said Mono county, referred to in the complaint herein.

That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his right, title and interest to certain water rights, and rights to the use of water; and the said water rights, and rights to the use of water, are in part the water rights and rights to the use of water, described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey, are not the same rights to water, and rights to the use of water, alleged in said complaints in said Mono County in this, that since the conveyance of said lands by said Thomas B. Rickey, and said water rights, and the right to the use of water, to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County, for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under

a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusively and peaceably.

That under the laws of the State of California, the adverse possession and use of water for a period of five years by the person or corporation claiming the right to said water, and its grantors and predecessors in interest, confers a title and right to the continued use of said water. By the laws of the State of California it is provided: "Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will, or succession. Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

That Charles Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company;
32 and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all times since the organization of said corporation have been, in the absolute control of said stock, free from any right by interference, management or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so owned and held by them, for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars.

That the Rickey Land and Cattle Company, a corporation, mentioned in the complaint herein, is not a defendant in the original complaint filed in that certain action, No. 731, referred to in the complaint herein, wherein Miller & Lux is complainant, and affiant and others, are defendants; nor has the said corporation been made a party by any order of this Court.

Affiant denies and says that it is not true that the only person really or at all interested in said corporation, the Rickey Land and Cattle Company, or really, or otherwise, owning any of the stock thereof, is the said affiant, Thomas B. Rickey. And denies and says it is not true that the persons, other than Thomas B. Rickey, affiant, forming the said corporation, the Rickey Land and Cat-

the Company, or holding stock thereof, are only nominees of the said Thomas B. Rickey, or that they hold their said stock solely, or at all, for him, or for his benefit.

That in the complaints in the actions commenced in Mono County, State of California, as alleged in the complaint herein, it is not alleged that the lands described in said complaints, or any of them, were conveyed to the plaintiff in said actions by the said Thomas B. Rickey, nor is any reference therein had to any conveyance or transfer by said Thomas B. Rickey to the said plaintiff in said action.

Affiant denies and says that it is not true that the complainants, Henry Wood, J. O. Birmingham, Charles Snyder and

34 Charles Johnston, or either of them, filed in this court the cross-bills, or any cross-bills, alleged in the complaint herein to have been filed, but in this behalf alleges that the said so-called cross-bills were not brought as such, and were and are, original bills.

Affiant denies and says that it is not true, that the issues, or any issue, tendered by said complaints in said two actions, or either of them, brought by the defendant, the Rickey Land and Cattle Company, herein, as plaintiff in said actions, against the complainants herein, and other persons, are, so far as concerns complainants herein, or either of them, the same issues, or any issue, which were tendered by the said alleged cross-bills, or either of them, mentioned in the complaint herein so filed in this court.

Affiant denies that at the time of filing by the defendant, the Rickey Land and Cattle Company, herein, of its complaints in the Superior Court of said County of Mono, State of California, or at any other time, the said defendant, the Rickey Land and Cattle Company, did not have or claim to have, or does not now have or claim to have, any right in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such right or rights, if any, as was acquired by said Rickey Land and Cattle Company by said conveyance alleged in the complaint herein to have been made to it from the said Thomas B. Rickey, affiant.

35 Denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in and by the actions, or either of them, commenced in the said Superior Court of the County of Mono, State of California, intended, or that the necessary or any effect of said actions, or either of them, is to bring on for trial or determination in said Superior Court, the same issues, or any issue, presented by the said cross-bills, or either of them, alleged to have been filed by the complainants herein in the said action, No. 731, wherein Miller & Lux is complainant, and the said affiant and others, are defendants.

And denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions commenced in said Superior Court of Mono County, is to obtain from said superior Court a judgment determining the issues, or any of them, presented by the

said cross-bills, or either of them in said complaint mentioned, in advance of a determination of the same by this court, or to do anything else therein, or to cause any other action to be taken by said Court for the purpose of defeating, or which will defeat, the jurisdiction of this court in the said suit alleged in complainants' complaint.

And the said affiant denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions, or either of them, so commenced in the Superior Court of Mono County, is to hinder or embarrass, or will hinder or embarrass, or that any action of said defendant in said Superior Court of Mono County, or any action of said Superior Court of Mono County in said actions, or either of them, will hinder or embarrass this court in the trial of the issues, or any of them, in said suit, or in the enforcement of any decree which this court may render in the said suit so pending before it.

And denies and says that it is not true that the further prosecution of said actions, or either of them, as against the complainants herein, or either of them, would be in derogation of the jurisdiction of this court, or of the rights, or any right, of the complainants, or either of them, in the cross-suits alleged in the complaint herein.

And in this behalf affiant alleges that the said actions so commenced in Mono County, and each of them, are brought in good faith, regardless of any effect they may have upon the said suit of Miller & Lux vs. T. B. Rickey and others, No. 731, in this cause, for the purpose of having and procuring a judgment quieting the title of said Rickey Land and Cattle Company to the said waters,

water rights, and the use of the waters described in said complaints in said actions commenced in Mono County, State of California, and are so brought at this time because the said Rickey Land and Cattle Company, and its officers, deem such action prudent and necessary, because of the old age and infirmity of many of the witnesses whose testimony is necessary to establish the rights of said Rickey Land and Cattle Company to the said waters, and rights to the waters, and rights to the use of waters described in said complainants in said actions commenced in Mono County, State of California, as against the defendants in said suits, and because the relief sought in said actions so commenced in the Superior Court of Mono County cannot be obtained in any other court.

Affiant further denies and says that it is not true that all, either, or any of the said acts, doings, or claims of the defendant, Rickey Land and Cattle Company, herein, are contrary to equity or good conscience, or that they, or either of them, tend to the manifest, or any, wrong, injury, or oppression of the complainants, or either of them, in the premises.

Wherefore, the affiant, on behalf of said Rickey Land and Cattle Company, prays that this Court deny the petition herein.

THOMAS B. RICKEY.

38 Subscribed and sworn to before me this 13th day of March,

A. D. 1905.

[SEAL.]

CHAS. H. PETERS.

Notary Public, in and for Ormsby Co., Nevada.

In the Circuit Court of the United States, Ninth Circuit, for the
District of Nevada.

HENRY WOOD ET AL., Complainants,

V.

RICKEY LAND AND CATTLE COMPANY, Defendant.

Affidavit of Charles Riekey.

STATE OF CALIFORNIA,

County of Inyo, ss:

Charles Rickey, being duly sworn, deposes and says: That he is, and at all the times mentioned herein was, a citizen of the State of California, over the age of twenty-one years and a resident of Topaz, county of Mono, State of California. That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (\$20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation. That Thomas B. Rickey does not now own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1,575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per

second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

CHARLES W. RICKEY.

Subscribed and sworn to before me this 10th day of March, 1905.

[SEAL.]

P. W. FORBES,

*Notary Public in and for the County
of Inyo, State of California.*

In the Circuit Court of the United States, Ninth Circuit, for the
District of Nevada.

HENRY WOOD ET AL., Complainants,

vs.

RICKEY LAND AND CATTLE COMPANY, Defendant.

41 *Affidavit of Alice B. Rickey.*

STATE OF NEVADA,

County of Ormsby, ss:

Alice B. Rickey, being duly sworn, deposes and says: That she is, and at all the times mentioned herein was, a citizen of the State of Nevada, over the age of twenty-one years and a resident of Carson City, County of Ormsby, State of Nevada. That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand (\$20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation. That Thomas B. Rickey, does not now own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and

42 is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant

corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1,575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

ALICE B. RICKEY.

43 Subscribed and sworn to before me this 13th day of March, 1905.

[SEAL.]

CHAS. H. PETERS,

Notary Public in and for Ormsby County, Nevada.

[Endorsed]: No. 790. In the Circuit Court of the U. S., Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, v. Rickey Land & Cattle Company, a Corporation, Defendant. Affidavit of Thomas B. Rickey, Charles Rickey and Alice B. Rickey to the Order to Show Cause why Injunction Should not Issue Restraining Action in Mono County. Filed March 13, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation, Defendant.

44

Order for Injunction Pendente Lite.

The motion of the above-named complainants requiring defendant, Rickey Land and Cattle Company, a corporation, to show cause why an injunction should not issue pending this suit, according to the prayer of the bill of complaint herein, having come on regularly to be heard upon said verified bill, and upon affidavits by the defendant in opposition thereto, and the Court having heard the arguments of counsel for the complainants and defendant, and the same having been duly considered by the Court, and it appearing to the Court that said complainants are entitled to an injunction pending this suit, according to the prayer of the bill herein:

Now, therefore, it is hereby ordered, adjudged and decreed, that said defendant, the Rickey Land and Cattle Company, a corporation,

its agents, servants and attorneys, and all persons acting in aid of them or any of them be, and they are hereby enjoined and restrained from further prosecuting as against said complainants, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, either of the two actions brought by said defendant, the Rickey Land and Cattle Company, on the 15th day of October, 1904, in the Superior Court of the County of Mono, State of California, against said

Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, and others, as defendants, and respectively numbered 1055 and 1056 on the register of said Superior Court, and from taking any further step whatsoever in either of said actions as against said Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, pending the final hearing and determination of this suit, and until the further order of this Court.

And it further appearing to the satisfaction of this Court that this injunction may be safely granted without requiring any bond from said complainants herein, it is further ordered that the writ of injunction may be issued herein as aforesaid without any bond being furnished by said complainants.

Dated June 25th, 1906.

THOMAS P. HAWLEY, *Judge*.

[Endorsed]: No. 790. In the Circuit Court of the United States for the District of Nevada. Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, Complainants, v. The Rickey Land and Cattle Company, a Corporation, Defendant. Order for Injunction Pendente Lite. Filed June 25th, 1906. T. J. Edwards, Clerk.

46 In the Circuit Court of the United States for the Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Petition for Appeal.

The above-named defendant, Rickey Land and Cattle Company, a corporation, conceiving itself aggrieved by the interlocutory order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled case, wherein it was ordered and decreed that the said defendant be enjoined and restrained from further prosecuting as against Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, either of the two certain actions brought by the defendant on the 15th day of October, 1904, in the Superior Court of Mono County,

47 State of California, respectively numbered 1055 and 1056 on the Register of Actions of said Superior Court, and from taking any further steps whatever in either of said actions as against said Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, pending the final hearing and determination of the said above-entitled suit and until the further order of said Circuit Court.

And the said Rickey Land and Cattle Company, a corporation, prays that this, its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the record and proceedings and papers upon which said interlocutory decree, order and judgment was made, duly authenticated, may be sent to said United States Court of Appeals for the said Ninth Circuit.

And now, at the time of filing this petition for appeal, the said Rickey Land and Cattle Company, a corporation, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be argued in the United States Circuit Court of Appeals for the said Ninth Circuit.

And your petitioner will ever pray.

RICKEY LAND AND CATTLE CO., INC.,

By T. B. RICKEY, *President*,

Defendant and Appellant.

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Defendant.

48 [Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood, et al., Complainants, vs. The Rickey Land and Cattle Company, a corporation, Defendant. Petition for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Offices, 911 Laguna St., San Francisco, Calif.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

Assignment of Errors.

Assignment of errors on appeal from the order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause, on the complaint of Henry Wood.

49 J. O. Birmingham, Charles Snyder and Charles Johnston, which said order and decree enjoined the Rickey Land and Cattle Company, a corporation, from prosecuting two certain actions in the Superior Court of Mono County, State of California, as against the said Complainants, and said Rickey Land and Cattle Company, a corporation, says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. The Court erred in making said order and decree appealed from in this, that the cross-complaints, and each of them, of the said complainants, wherein the said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the right of said cross-complainants, to the use of the water of Walker River, as between said cross-complainants, and the Rickey Land and Cattle Company, a corporation, and T. B. Rickey, the predecessor in interest of the said Rickey Land and Cattle Company, upon which said cross-complaints said order and decree was predicated, was not a proper cross-complaint in the action in which the same were filed as against T. B. Rickey, or as against his successor in interest, said Rickey Land and Cattle Company, because the said rights sought to be determined between each of the said cross-complainants, in said cross-complaints, as against T. B.

50 Rickey and his successor, the said Rickey Land and Cattle Company, a corporation, were in no manner defensive to the main action of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, nor was the determination of the controversy sought to be made by said cross-complaints between said cross-complainants and said T. B. Rickey, or his successor in interest, said Rickey Land and Cattle Company, necessary in order that either of the said cross-complainants might make a full and complete defense of all rights of said cross-complainants in the said cause of Miller & Lux vs. T. B. Rickey, and said cross-complainants and others.

Second. The Court erred in making said order and decree appealed from in this, that the cross-complaints of the complainants herein, filed by them in the action of Miller & Lux vs. T. B. Rickey and said cross-complainants, and others, wherein the said cross-complainants, herein, sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the rights to the use of the water of Walker River, between said cross-complainants and T. B. Rickey and the Rickey Land and Cattle Company, upon which said cross-complaints said order and decree appealed from was predicated, was not a proper cross-complaint in said action of Miller & Lux, vs. T. B. Rickey and others, because the said controversy made between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle

51 Company, was a controversy between residents of the same State, to wit, residents of the State of Nevada, and the said controversy and the determination of said controversy between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle Company, was in no way necessary or pertinent to the full determination of the defense of either of

the said cross-complainants in said suit of Miller & Lux vs. T. B. Rickey and said cross-complainant and others, and neither of the said cross-complaints was in any manner ancillary to said suit of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, had no jurisdiction to determine the controversy sought to be made by each of said cross-complainants between said cross-complainants and said T. B. Rickey, or his successor in interest, the said Rickey Land and Cattle Company, all of whom were residents of the State of Nevada.

Third. That each of said cross-complaints filed by said complainants herein in the action of Miller & Lux vs. T. B. Rickey and others, in so far as it makes a party thereto the Rickey Land and Cattle Company, was not a proper cross-complaint in the action of Miller & Lux vs. T. B. Rickey and the said cross-complainants and others, because each of said cross-complaints introduces
52 a new party to said action, to wit, the Rickey Land and Cattle Company, and said order and decree appealed from predicated upon said cross-complaints was error.

Fourth. That the jurisdiction of the Superior Court of Mono County had attached to all the defendants in said actions in Mono County by the service of summons in said actions upon all the defendants therein, including the complainants herein, before the writs of subpoena ad respondendum, issued out of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, upon and pursuant to the prayers in each cross-complaint filed by the complainants herein in said action of Miller & Lux vs. T. B. Rickey and others, had been served, so that the Superior Court of Mono County acquired jurisdiction to quiet the title of said Rickey Land and Cattle Company to the use of the waters of the Walker River in the State of California, before the said Circuit Court of the United States, Ninth Circuit, District of Nevada, acquired any jurisdiction of the defendant Rickey Land and Cattle Company by reason of the filing of said cross-complaints, and it was, therefore error for the Circuit Court of the District of Nevada to make its order and decree appealed from based upon the said cross-complaints.

Fifth. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff therein, the
53 Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River in the State of California, and to procure a judgment of the Superior Court of Mono County quieting the title of the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River, and to the use of certain of the waters of the Walker River in the State of California, as against the said complainants herein, and others, and the said action of Miller & Lux vs. T. B. Rickey and others in the Circuit Court of the United States, Ninth Circuit, District of Nevada, was brought to enjoin T. B. Rickey and the said complainants herein from diverting the waters of said Walker River, and the said Circuit Court erred in making the decree herein appealed from, be-

cause no proceeding which has been taken, nor any proceeding which might be taken, nor any judgment which might be rendered in the Superior Court of Mono County in said actions commenced and prosecuted therein, could in any manner, way or form, impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, nor could the same in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth

54 Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, so far as either of the said complainants herein had a right to invoke the powers of the said Circuit Court of the United States, Ninth Circuit of the District of Nevada.

Sixth. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff herein, the Rickey Land and Cattle Company, a corporation, to certain waters and the use of certain waters of the Walker River in the State of California, and to procure judgment of the Superior Court of said Mono County quieting the title of the Rickey Land and Cattle Company as against the said complainants herein and others, and the said action of Miller & Lux vs. T. B. Rickey and others, including complainants herein, in the Circuit Court of the United States, Ninth Circuit, District of Nevada, was brought to enjoin T. B. Rickey and others, including complainants herein, from diverting the waters of said Walker River, and the interlocutory order and decree herein appealed from was rendered in a proceeding claimed to be ancillary to said action of Miller & Lux vs. T. B. Rickey and others, because said Rickey Land and Cattle Company was not a party to said action of Miller & Lux vs. T. B. Rickey et al., and would not be bound by the judgment or decree rendered therein, and the said

55 Circuit Court of the United States, Ninth Circuit, District of Nevada, erred therefore in restraining the Rickey Land and Cattle Company from prosecuting said actions in said Mono County.

Seventh. That the said Circuit Court, Ninth Circuit, District of Nevada, had no jurisdiction to try and determine the rights to the use by T. B. Rickey of the waters of Walker River in the State of California, nor the title of T. B. Rickey to the waters of Walker River in the State of California, nor the use by the Rickey Land and Cattle Company, a corporation, of the waters of the Walker River in the State of California, nor the title of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California, in said action of Miller & Lux vs. T. B. Rickey et al., and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of T. B. Rickey, to the use of said water and the right to the use of said water, because the water was in the State of California, and the use of said water and the diversion of said water was made by said T. B. Rickey and by the said Rickey Land and Cattle Company, his successor, in the State of California,

and the said water and the land upon which the use of the said water was made was all in the State of California and not in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of said Rickey Land and Cattle Company to the use of the water of the Walker River or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River as the successor of T. B. Rickey, and the said Court erred therefore in rendering the said order and decree restraining appellant from prosecuting said actions in Mono County.

Eighth. That the Court had no jurisdiction to render said order and decree appealed from as against the appellant, Rickey Land and Cattle Company.

Ninth. That it was error for the said Circuit Court of the District of Nevada to make and render said order and decree appealed from.

Tenth. That the said complaint upon which said interlocutory order and decree appealed from was granted does not state facts sufficient to entitle the complainants therein to the said interlocutory order and decree.

Eleventh. That before the cross-complaints filed by the complainants in the action of Miller & Lux vs. T. B. Rickey and others, including complainants, the Rickey Land and Cattle Company, a corporation, was the owner of all the right, title and interest of, in and to the waters of the Walker River, and in and to the use of the waters of the Walker River which the Rickey Land and Cattle Company have since been entitled to and owned, and at the time that the said Rickey Land and Cattle Company acquired its rights and ownership of the said waters of the Walker River and the use of the said waters of the Walker River, there was no proceeding or proceedings in the Circuit Court of the United States, Ninth Circuit, District of Nevada, commenced by or on behalf of said complainants, or either of them, affecting or involving the title of said T. B. Rickey, the grantor of the Rickey Land and Cattle Company, thereto, and the said Rickey Land and Cattle Company was not a party to the suit of Miller & Lux vs. T. B. Rickey and others, including said complainants; therefore the court erred in enjoining and restraining the prosecution of said suit in Mono County by said interlocutory order and decree appealed from.

In the action of Miller & Lux, a corporation, vs. T. B. Rickey and others, commenced in the Circuit Court of the United States, Ninth Circuit, for the District of Nevada, the Pacific Livestock Company, a corporation, was substituted as complainant, and whenever said action is referred to herein it is intended to include the said action as the same is now pending, with said substituted complainant.

Wherefore, the appellant, the Rickey Land and Cattle Company, prays that the decree of said Circuit Court of the United States, Ninth Circuit, for the District of Nevada, be reversed and the said Circuit Court of the United States, Ninth Circuit, for the District of Nevada, be ordered to enter an order and

decree dissolving the injunction and restraint made by the said order and decree appealed from.

RICKEY LAND AND CATTLE CO. INC.

[SEAL.] By T. B. RICKEY, *President,*
Defendant and Appellant.

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for said Corporation Appellant.

[Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation. Defendant. Assignment of Errors. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Offices 911 Laguna St., San Francisco, Calif. Filed July 23, 1906. T. J. Edwards, Clerk.

59 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),
Defendant.

Order for Appeal.

It is ordered that the appeal of the Rickey Land and Cattle Company, appellant, in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory order and decree made in the above-entitled court on the 25th day of June, 1906, in the above-entitled cause, be, and the same hereby is allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

60 And it is further ordered that the bond on appeal be fixed at the sum of five hundred dollars (\$500), the same to act as a bond for costs and damages on appeal.

Dated San Francisco, Cal., July 23d, 1906.

WM. W. MORROW, *Circuit Judge.*

[Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Order for Appeal. Filed July 23, 1906, T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Office 911 Laguna St., San Francisco, Calif.

Bond on Appeal.

Know all men by these presents, that we, Rickey Land and Cattle Company, as principal, and S. Trask and H. C. Cutting, as sureties, are held and firmly bound unto Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, in the full and just sum of five hundred dollars, to be paid the said Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, certain attorney, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

61 Sealed with our seals and dated this 23d day of July, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Circuit Court of the United States, for the Ninth Circuit, District of Nevada, in a suit depending in said Court, between Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston as complainants and Rickey Land and Cattle Company, a corporation, as defendant, an interlocutory order and decree was rendered against the said Rickey Land and Cattle Company and the said Rickey Land and Cattle Company, a corporation, having obtained from said Court an order allowing it to appeal to reverse the said order and decree in the aforesaid suit, and a citation directed to the said Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Rickey Land and Cattle Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

RICKEY LAND AND CATTLE CO., INC., [SEAL.]

By T. B. RICKEY, *President*.

S. TRASK.

[SEAL.]

H. C. CUTTING.

[SEAL.]

62 Acknowledged before me the day and year first above written.

[SEAL.]

F. D. MONCKTON,

*Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.*

UNITED STATES OF AMERICA,

District of Nevada, ss:

S. Trask and H. C. Cutting, being duly sworn, each for himself, deposes and says, that — is a freeholder in said District, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

S. TRASK.

H. C. CUTTING.

Subscribed and sworn to before me this 23d day of July, A. D. 1906.

[SEAL.]

F. D. MONCKTON,
*Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.*

[Endorsed]: No. 790. United States Circuit Court, District of Nevada, for the Ninth Circuit. Henry Wood et al., Complainants, vs. Riekey Land and Cattle Company, a Corporation, Defendant. Bond on Appeal. Form of bond and sufficiency of sureties approved. Wm. W. Morrow, Judge, Filed July 23d, 1906. T. J. Edwards, Clerk.

63

Clerk's Certificate to Transcript.

DISTRICT OF NEVADA, ss:

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing forty-two typewritten pages, numbered from 1 to 42, inclusive, are a full, true and correct copy of the record and of all proceedings in the case therein entitled; and the costs of said record are thirty dollars, which have been paid by the respondent and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Carson City, Nevada, this 25th day of August, 1906.

[SEAL.]

T. J. EDWARDS, *Clerk.*

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

The President of the United States, to Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, and to A. M. Kidd, their Solicitor, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the Ninth Circuit, District of Nevada, wherein the Riekey Land and Cattle Company (a corporation), is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the Ninth Circuit, this 23d day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

Received copy of the within citation this 27th day of July, 1906.

A. M. KIDD,

Per ISAAC FROHMAN,

Solicitor for Appellee.

[Endorsed:] No. 790. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Henry Wood et al., Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

65 [Endorsed:] No. 1365. United States Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Company, a Corporation, Appellant, vs. Henry Wood, James E. Birmingham, Charles Snyder, and Charles Johnston, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Nevada.

Filed August 29, 1906.

F. D. MONCKTON, *Clerk.*

66 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.

HENRY WOOD ET AL., Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-five (65) pages, numbered from one (1) to sixty-five (65), inclusive, to be a true copy of the printed Transcript of Record in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules and practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22d day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

67 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Appellees.

*Proceedings Had in the United States Circuit Court of Appeals for
the Ninth Circuit.*

ADDENDA.

Upon Appeal from the United States Circuit Court for the District
of Nevada.

68 At a stated term, to wit, the October term, A. D. 1906, of
the United States Circuit Court of Appeals for the Ninth
Circuit, held at the courtroom, in the City and County of San
Francisco, on Wednesday, the thirty-first day of October, in the
year of our Lord one thousand nine hundred and six. Present:
The Honorable William B. Gilbert, Circuit Judge; Honorable
Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolverton,
District Judge.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Order of Submission.

Ordered, appeal argued by Mr. James F. Peck, counsel for the
appellant, and Mr. W. B. Treadwell, counsel for the appellees,
and submitted to the Court for consideration and decision, with
leave to counsel for the appellant to file a reply brief within fif-
teen (15) days.

69 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Upon Appeal from the United States Circuit Court for the District
of Nevada.

Opinion of U. S. Circuit Court of Appeals.

The facts of this case differ from those upon which the case of Rickey Land and Cattle Company vs. Miller & Lux, just decided, proceeded, only in that, in the original suit of Miller & Lux vs. Rickey et al., the present appellees, being codefendants with Rickey in that suit, filed cross-bills therein, whereby they claimed to be entitled to certain appropriations of water from Walker River, for use upon their lands—the diversions being made and the lands being situated in the State of Nevada; and it was alleged that Rickey had been and was then diverting the water from the stream above,

70 which deprived the cross-complainants of the amount to which they were entitled under their appropriations. Such cross-bills were filed December 20, 1904, and writs of subpoena were issued thereon, and served upon Rickey the same day. And it is further shown that the summons issued in the causes instituted in the Superior Court of Mono County, California, were served upon appellees December 26, 1904. The appellees obtained, after notice and hearing, an order of court temporarily restraining the appellant from making any diversions of water from Walker River to their detriment, from which order this appeal is prosecuted.

James F. Peck and Charles C. Boynton, for Appellant.

W. C. Van Fleet and W. B. Treadwell (Frohman & Jacobs and Frank H. Short, of Counsel), for Appellees.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

WOLVERTON, District Judge delivered the opinion of the Court.

The single question urged here, in addition to those determined in the case of Rickey Land and Cattle Company vs. Miller & Lux, is whether the appellees have a standing in court whereby to maintain their cross-bills as against appellant. The appellant and the

71 appellees are all codefendants in the cause of Miller & Lux vs. Rickey et al., and all citizens of the State of Nevada; and, in their cross-bills, it will be seen, the appellees do not dispute the right of diversion by Miller & Lux, nor claim that its diversions are in any way subordinate to theirs; but they do allege that the appropriations of Rickey, whatever they may be, are subject and subordi-

nate to theirs, and pray that the Rickey Land and Cattle Company may be enjoined from diverting the waters of Walker River in any manner to their detriment or injury.

The nature and purpose of a cross-bill in equity have been clearly determined. Says Mr. Justice Nelson, in *Ayres vs. Carver*, 17 Howard, 591, 595:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke, that both the
72 original and cross-bill constitute but one suit, so intimately are they connected together."

To the same purpose is *Ex parte Railroad Co.*, 95 U. S. 221, 225, where it is said:

"A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the Court, so that there may be a complete decree touching the subject-matter of the action."

So Sanborn, Circuit Judge, says in *Stuart vs. Hayden*, 72 Fed. 402, 410:

"A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original
73 bill, and must be dismissed, because there cannot be two original bills in the same case.

Cross vs. De Valle, 1 Wall. 1.

Rubber Co. vs. Goodyear, 9 Wall. 807.

Young vs. Colt, 2 Blatch. 373.

Stonemetz Printers' Mach. Co. vs. Brown Folding Mach. Co., 46 Fed. 851.

Counsel for appellant expressly admit that if the cross-bills are ancillary in purpose and character, they should be entertained regardless of the citizenship of the parties defendant. This reduces the inquiry simply to whether such cross-bills are, in legal contemplation, ancillary to the original bill, or whether they introduce matter foreign to, and disconnected with, the subject-matter of the original suit.

In the light of the foregoing authorities, it may well be premised that, if the cross-bills operate defensively in behalf of the appellees in some substantial way, then they are pertinent and afford appellees a standing whereby to assert such rights as will protect them against the suit of complainant in such cause; and this although they might impinge upon the alleged rights of the appellant. A suit respecting water appropriations from a stream is *sui generis*, and it may, and does frequently, happen that, in order fully

74 to protect the rights of one appropriator against those of another, it is necessary to determine also the rights of the former, not only with reference to those of that other, but also with reference to those of still others upon the same stream. We can adduce no better illustration than that suggested by counsel for appellees. Suppose that A, B and C are appropriators of 10 cubic feet of water each from the same stream, within which is running but 30 cubic feet. A, the lower appropriator, sues, and procures a decree and injunction against B and C, from diverting more water than will allow A's 10 cubic feet to come down to him. B might divert 20 feet, and C but 10, the amount only to which the latter is entitled, and yet both B and C would be guilty of a violation of the injunctive decree, because A has been deprived of his 10 feet of water. Now, does it not seem perfectly clear that, if C had set up, by cross-bill to A's original bill, his interest in the stream, the decree would have been different, and would have gone against B and C severally, and not jointly, so that a violation of the injunction by B would not have been also a violation by C, who was innocent of any wrong? Is there not here matter for substantial defense, to sustain such a cross-bill? The answer is obvious. The cross-bill in such a case would be germane to the subject matter of the original bill, and would operate defensively in behalf of the defendant inter-

75 posing it. So it would be a matter of defense for C to have his appropriation fixed as against B. The identical question has received careful consideration in the case of *Ames Realty Co. vs. Big Indian Mining Co.*, 146 Fed. 166, at the hands of Hunt, District Judge, whose reasoning is so able, lucid, and cogent as to scarcely admit of any further controversy. He concludes, after making apt illustration of the case in hand, as follows:

"Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction over the case between complainant and first defendant, and, having jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the questions in the affirmative. It is true that if complainant can secure protection of its own right, junior appropriators might be left to fight out their relative rights among themselves; but, as conditions frequently exist in litigation over usufruct of water, where it is practically impossible to make a just decree between complainant and one defendant without ascertaining rights of defendants as against one another, the Court will permit cross-complaints to stand, to the end that a multiplicity of suits may be avoided, so that tedious, expensive, and unnecessary litigation may be saved."

76 In *Union Mill & Mining Co. vs. Dangberg*, 81 Fed. 73, as against the objection that the defendants, of whom there were about 125, were not all jointly interested in their appropriations to the injury of complainant, and therefore should not have been made parties, Judge Hawley has this to say:

"These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of which it complains. Everyone who contributes to such injury is properly made a party respondent."

77 The reason is cogent in demonstration of the interdependent relations that exist among different appropriators from the same stream, and of the condition that one appropriator cannot always be fully protected against the injunctive process of another, unless at the same time he has his own rights ascertained and determined with relation to still others who are also subject to the same process. And so we conclude that the order appealed from should be affirmed, and it is so ordered.

[Endorsed]: 1365. U. S. Circuit Court of Appeals for the Ninth Circuit. *The Rickey Land and Cattle Co. vs. Henry Wood et al.* Opinion. Filed March 4, 1907. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Appellees.

78 *Decree of U. S. Circuit Court of Appeals.*

Appeal from the Circuit Court of the United States for the District of Nevada.

This cause came — to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order or decree of the said Circuit Court appealed from in this cause be, and the same is hereby affirmed, with costs.

[Endorsed]: Decree. Filed and entered March 4, 1907. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court-room, in the city and county of San Francisco, on Monday, the twentieth day of May, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

79

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Order Denying Petition for Rehearing, etc.

Ordered, petition for a rehearing, heretofore filed herein, denied.

Upon motion of Mr. Charles C. Boynton, counsel for the appellant, ordered, issuance of mandate of this Court in the above-entitled cause stayed for the period of ten (10) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

80

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fourteen (14) pages, numbered from one (1) to fourteen (14), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals,
Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

81 UNITED STATES OF AMERICA, *vs.*

[Seal of the Supreme Court of the United States]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rickey Land and Cattle Company is appellant, and Henry Wood, James E. Birmingham, Charles Snyder, and Charles Johnston are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Nevada, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United

82 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,056. Supreme Court of the United States. No. 653, October Term, 1907. Rickey Land & Cattle Co., vs. Henry Wood et al. Docketed No. 1365. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

83 United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Appellees.

On Appeal from the Circuit Court of the United States for the
District of Nevada.

Stipulation.

Whereas the Supreme Court of the United States has heretofore duly issued its writ of certiorari directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit directing said Judges to send without delay to the said Supreme Court of the United States the record and proceedings in the above entitled cause:

Now, therefore, it is hereby stipulated by and between the attorneys of record for the respective parties above-named that the certified transcript of record heretofore filed in the Supreme Court of the United States in connection with and in support of the petition for said writ of certiorari, the same being docketed as No. 653 of October Term, 1907, shall be taken and considered as the transcript of the record and proceedings remaining in the Circuit Court of Appeals for the Ninth Circuit as though the same had been returned in obedience to said writ of certiorari.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Appellant.
W. B. TREADWELL,
Attorney for Appellees.

FRANK H. SHORT,
FROHMAN & JACOBS,
Of Counsel for Appellees.

84 (Endorsed:) Docketed. No. 1365. United States Circuit Court of Appeals, Ninth Circuit. Rickey Land & Cattle Co., Appellant, vs. Henry Wood, James E. Birmingham, Charles Snyder and Charles Johnston, Appellees. Stipulation as to Return to Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Chas. C. Boynton, Attorney at Law, 1064 Mills Bldg., San Francisco, Cal.

85 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Appellees.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next two preceding pages, numbered one (1) and two (2), to be a true copy of a "Stipulation as to Return to Writ of Certiorari" filed in the above-entitled cause on the twenty-fifth day of March, A. D. 1908, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, Clerk.

86 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and
CHARLES JOHNSTON, Appellees.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ of a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 2nd day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] 653/21056.

87 [Endorsed:] File No. 21,056. Supreme Court U. S. October Term, 1909. Term No. 653. 94. Rickey Land & Cattle Co., Petitioner, vs. Henry Wood et al. Writ of Certiorari & return. Filed May 18th, 1908.

UNITED STATES COURT, D. C.

FILED.

MAR 4 1908

JAMES H. MCKENNEY

CLEAR

No. 

IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

**HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER and CHARLES JOHNSTON,**
Respondents.

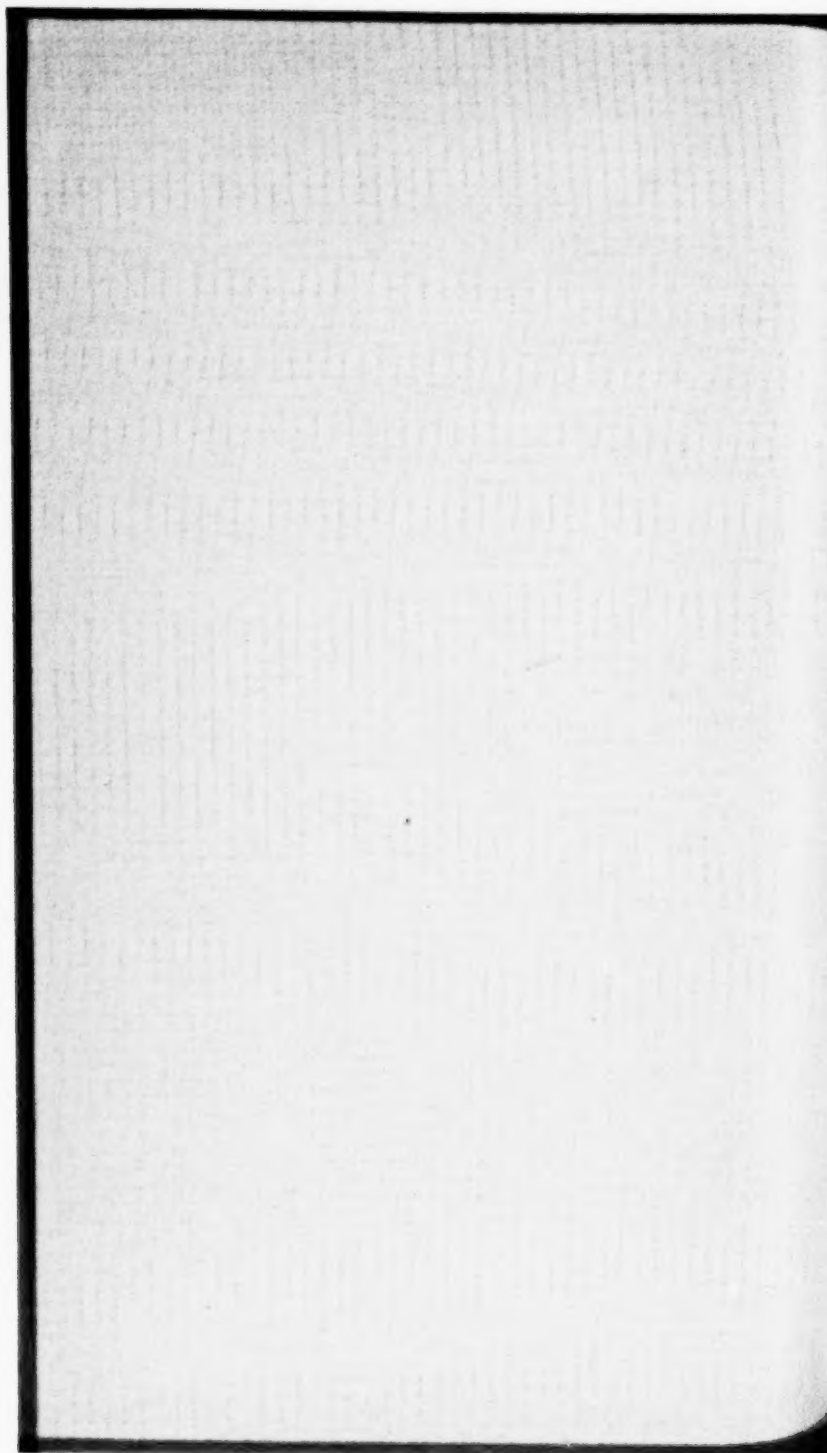
MOTION FOR WRIT OF CERTIORARI
AND NOTICE OF MOTION.

F. D. MCKENNEY.

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Petitioner.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

Rickey Land and Cattle
Company (A CORPORATION),

Petitioner,

vs.

HENRY WOOD, JAMES O. BIR-
MINGHAM, CHARLES SNY-
DER AND CHARLES JOHN-
STON,

Respondents.

MOTION FOR WRIT OF CERTIORARI FROM THE SUPREME
COURT OF THE UNITED STATES TO THE CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

Comes now the Rickey Land & Cattle Co., a cor-
poration, by its counsel appearing in that behalf,
and moves this Honorable Court that it shall, by
certiorari, or other proper process, directed to the
Honorable the Judges of the United States Circuit
Court of Appeals for the Ninth Circuit, require said

Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the respondents, Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, were appellees, and your petitioner, Rickey Land & Cattle Co., was appellant, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

.....**F. D. MCKENNEY**.....

Counsel for said Petitioner for the purpose of this motion.

IN THE SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM.

RICKEY LAND & CATTLE CO.
(A CORPORATION),

vs.

HENRY WOOD, JAMES O. BIR-
MINGHAM, CHARLES SNY-
DER AND CHARLES JOHN-
STON,

Appellant,

Respondents.

NOTICE OF APPLICATION TO THE SUPREME COURT OF
THE UNITED STATES FOR WRIT OF CERTIORARI.

Henry Wood James O. Birmingham Charles Snyder
To ~~Miller & Lux, a corporation~~, Appellee, and to
W. B. Treadwell, Frank H. Short, and Frohman
& Jacobs, its counsel:

Please take notice that on Monday, the 2nd
day of March, 1908, at the opening of the Court
on that day, or as soon thereafter as counsel can be
heard, that the Rickey Land & Cattle Company, a

corporation, appellant, will, upon its verified petition and a copy of the entire record in this cause, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room, at the Capitol in the City of Washington, D. C. **F. D. MCKENNEY.**

JAMES F. PECK,
CHARLES C. BOYNTON,
 Solicitors for Appellant.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for a writ of certiorari and brief in support of petition are hereby acknowledged, and it is hereby stipulated and agreed that the said motion may be submitted to the Court on Monday, the 2nd day of March, 1908.

W. B. TREADWELL,
FRANK H. SHORT,
FROHMAN & JACOBS,

Solicitors for Henry Wood, James O. Birmingham,
 Charles Snyder and Charles Johnston, Appellees.

Office Secretary

FILED

MAR 4 1908

JAMES H. McKEN

No.

653. 322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE COMPANY
(a Corporation),

Petitioner,

vs

HENRY WOOD, JAMES O. BIRMINGHAM,
CHARLES SNYDER and CHARLES JOHNSTON,

Respondents.

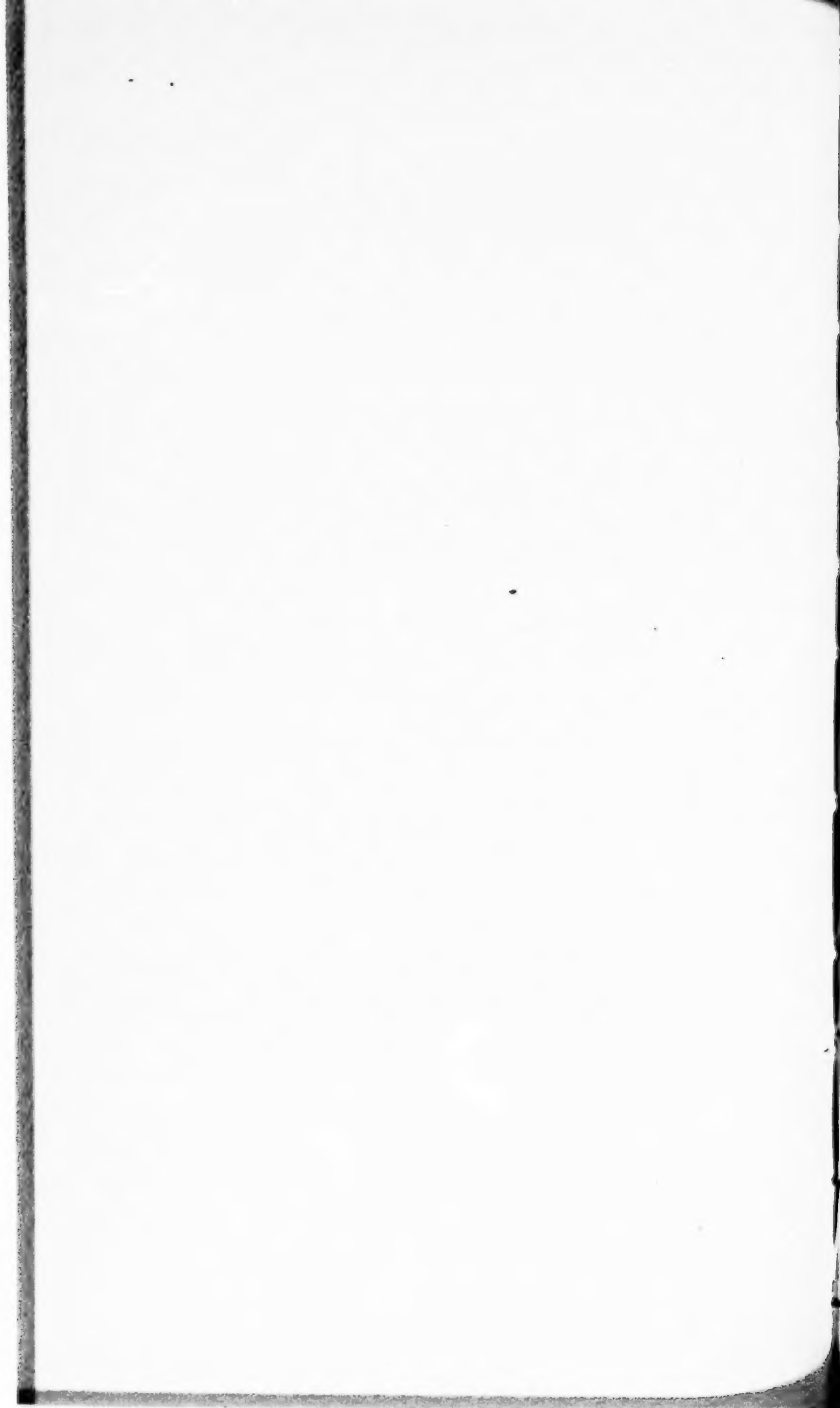
Petition for Writ of Certiorari.

F. D. MCKENNEY,

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Petitioner.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE
COMPANY (a Corporation),

Petitioner,

vs.

HENRY WOOD, JAMES O. BIR-
MINGHAM, CHARLES SNY-
DER AND CHARLES JOHN-
STON,

Respondents.

No. —

*To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United States:*

The petition of the Rickey Land and Cattle Com-
pany, a Corporation, respectfully shows to this Hon-
orable Court as follows:

I.

That the Rickey Land and Cattle Company is now,
and ever since the 6th day of August, 1902, has been,
a corporation created, existing, and acting under the
laws of the State of Nevada and having its principal

place of business at Carson City, in the State of Nevada.

That Miller & Lux is now, and ever since the time prior to 1900 has been, a corporation created, existing, and acting under and by virtue of the laws of the State of California.

II.

That on the 10th day of June, 1902, a bill of complaint was filed in the Circuit Court of the United States for the District of Nevada by said Miller & Lux, against 137 defendants, including Thomas B. Rickey, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, to enjoin each of them from diverting the water of the Walker River. It was alleged in said complaint that each of said defendants was diverting water from the Walker River under a claim of right so to do, and were so diverting the said water at a place above the place on said river where said complainant, Miller & Lux, had a right to divert and had diverted said water from said river.

Complainant, Miller & Lux, in the suit so commenced on the 10th day of June, 1902, alleged that it was, and that it and its predecessors in interest, had been for many years the owner of certain lands situate in the State of Nevada, through and over which the said Walker River in its course flowed, and that it and its predecessors had for many years

diverted the water from the said Walker River and used the same for the irrigation of the said lands so owned by Miller & Lux, complainant, and alleged that the said diversions of water so made by said Miller & Lux were made prior to the diversions of water or any of them by the defendants in said suit, and Miller & Lux alleged that it and its predecessors had diverted from the said Walker River, as aforesaid, the flow of 943 29/100 cubic feet of water per second and claimed a prior right as against all the defendants to continue to divert the said quantity of water from the said river.

That the subpœna ad respondendum was issued and served upon all the defendants in the action so commenced by said complainant on the 10th day of June, 1902.

III.

That defendant, Thomas B. Rickey, in the action so commenced by Miller & Lux on the 10th day of June, 1902, filed his plea to the jurisdiction of the United States Circuit Court for the district of Nevada, and said Thomas B. Rickey in said plea alleged that the said Walker River was a natural watercourse, arising in and flowing through the eastern part of the State of California into and through the western part of the State of Nevada, and further alleged in said plea that all diversions of water made by said Thos. B. Rickey from the said Walker River

were made in the State of California and were used for the irrigation of lands owned by the said Thomas B. Rickey in the State of California, and said Thomas B. Rickey in said plea disclaimed any right or claim of right to divert any of the waters of the Walker River in the State of Nevada; and the said Thomas B. Rickey, because of said facts stated in said plea, pleaded that the said United States Circuit Court for the District of Nevada had no jurisdiction in said action commenced by Miller & Lux on the 10th day of June, 1902, to enjoin a diversion of the water by said Thomas B. Rickey in the State of California.

That said plea was argued, submitted, and overruled by the Court. See Opinion of the Court in *Miller & Lux vs. Rickey et al*, 127 Federal Report, 573.

IV.

On the 6th day of August, 1902, Thomas B. Rickey and others organized the corporation, the Rickey Land and Cattle Company, petitioner herein, and on the said 6th day of August, 1902, after the organization of the said corporation, the said Thomas B. Rickey transferred and conveyed, by deeds of conveyance properly executed and acknowledged, to said corporation all the lands and water rights and rights to the use of water of said Thomas B. Rickey in the State of California, including the water and

rights to the use of water of the Walker River in the State of California.

V.

That the said Walker River is, and from time immemorial has been, a natural stream and water-course with well defined bed and banks, having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and both of said branches have their source in, and flow for a long distance through, the eastern part of the State of California, into and through, for a long distance, the western part of the State of Nevada, where they unite, forming the main Walker River in the State of Nevada.

That the alleged diversions of water from the said Walker River by said complainant, Miller & Lux, are made below the junction of the said two branches of the said Walker River.

That the said Walker River in its course, in the State of California, flows through the lands so conveyed by the said Thomas B. Rickey to the said Rickey Land and Cattle Company, which said lands form the bed and banks of the said Walker River in the State of California.

VI.

That on the 15th day of October, 1904, the Rickey Land and Cattle Company, the petitioner herein,

commenced an action in the Superior Court, County of Mono, State of California, against 166 defendants, including Miller & Lux, the complainant in said action commenced in the Circuit Court of the United States for the district of Nevada, and including Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnson, by filing a complaint; in which complaint the said Rickey Land and Cattle Company alleged that it was the owner in possession and entitled to the possession of certain lands in the State of California, which lands were the same lands conveyed to it by the said Thomas B. Rickey, as aforesaid, and further alleged that the said lands constituted one entire, continuous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of the said Walker River, called the West Fork of the Walker River, and further alleged that said lands and all thereof are, and from time immemorial have been riparian to said West Fork of said Walker River and situate along and bordering upon said West Fork of said Walker River, and further alleged that the said Rickey Land and Cattle Company was the owner in the possession of and entitled to the possession, use, and enjoyment of, and that it has the right to divert and appropriate, and for many years has diverted and appropriated and used, all the water of the said West Fork of the Walker River and its tributaries in the State of California to the extent

of a constant flow of 1575 cubic feet of water per second, for use upon the said lands in the State of California riparian to said West Fork of the said Walker River, and further alleged in said complaint so filed in the Superior Court of Mono County that each of the defendants in said action, including said Miller & Lux, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, claim some right, title, and interest adverse to the said Rickey Land and Cattle Company in and to said constant flow of 1575 cubic feet of water per second, or some part or portion thereof in the State of California, and that said right, title, and interest so claimed by each of said defendants, including said Miller & Lux, in and to said water, is without right, and that all claims of said defendants, and of each of them, to the waters of the said West Fork of the said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company and to its right to divert and appropriate and use from the said West Fork of the said Walker River in the State of California a constant flow of 1575 cubic feet of water per second for use upon its said lands riparian to said West Fork of the said Walker River in the State of California, and the said Rickey Land and Cattle Company, in said complaint, filed in said Superior Court of Mono County prayed that said Superior Court of Mono County, California, should adjudge that the said

Rickey Land and Cattle Company is the owner in the possession, use, and enjoyment, and is entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said West Fork of said Walker River in the State of California to the extent of a constant flow of 1575 cubic feet of water per second for use on its said lands riparian to the West Fork of the said Walker River in the State of California, and therein further prayed that the Court adjudge that neither of the defendants therein, including Miller & Lux, • Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, has any right, title, and interest, claim or estate in or to any of the waters flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than 1575 cubic feet of water per second, and that it be further adjudged that the said defendants, and each of them, be estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors, or assigns, any right, title, or interest, claim or estate, in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than 1575 cubic feet of water per second.

VII.

That on the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court, County of Mono, State of California, against one hundred and fifty-two defendants, including said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, by filing a complaint, in which complaint the said Rickey Land and Cattle Company alleged that it was the owner in possession, and entitled to the possession, of certain lands in the State of California, which lands were the same lands conveyed to it by the said Thomas B. Rickey, as aforesaid, and further alleged that the said lands constitute one entire continuous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of the said Walker River, called the East Fork of the Walker River, and further alleged that said lands and all thereof are, and from time immemorial have been, riparian to the East Fork of the said Walker River, situate, along, and bordering on said East Fork of the said Walker River, and further alleged that the said Rickey Land and Cattle Company was the owner in the possession of, and entitled to the possession, use, and enjoyment of, and that it has the right to divert and appropriate, and for many years has diverted and appropriated and used all the water

of said East Fork of the said Walker River and its tributaries, in the State of California, to the extent of a constant flow of 504 cubic feet of water per second, for use upon lands in the State of California riparian to said East Fork of the said Walker River, and further alleged in said complaint so filed in the Superior Court of Mono County, that each of the defendants in said action, including the said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, claims some right, title, and interest adverse to the said Rickey Land and Cattle Company in and to said constant flow of 504 cubic feet of water per second, or some part or portion thereof, in the State of California, and that said right, title, and interest so claimed by each of said defendants, including the said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, in and to said waters is without right, and that all claims of the said defendants and each of them to the waters of the said East Fork of the said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company and to its right to divert and appropriate and use, from the said East Fork of the said Walker River in the State of California, a constant flow of 504 cubic feet of water per second for use upon its said lands riparian to said East Fork of the said Walker River in the State of California, and the said Rickey Land and Cattle Company in said

complaint, filed in said Superior Court of Mono County, prayed that said Superior Court of Mono County, California, should adjudge that the said Rickey Land and Cattle Company is the owner in the possession, use, and enjoyment, and entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California to the extent of a constant flow of 504 cubic feet of water per second for use on its said lands riparian to the East Fork of the said Walker River in the State of California, and therein further prayed that the Court adjudge that neither of the defendants therein, including said Miller & Lux, James O. Birmingham, Henry Wood, Chas. Snyder, and Chas. Johnston, has any right, title, or interest, claim or estate in or to any of the waters flowing, or which may hereafter flow, in said East Fork of the said Walker River in the State of California when the quantity of water then flowing is less than 504 cubic feet of water per second, and further therein prayed that it be adjudged that each of said defendants be estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors, or assigns, any right, title, or interest, claim or estate in or to any of the waters, or the use thereof, which are now flowing, or which may hereafter flow in said East Fork of the said Walker River in said State of California when the quantity of water there-

in flowing is less than 504 cubic feet of water per second.

VIII.

That on the 20th day of December, 1904, the said Henry Wood, James O. Birmingham, and Chas. Snyder, filed in the United States Circuit Court for the district of Nevada in the said suit so originally brought by the said Miller & Lux against the said Thomas B. Rickey and others, their cross-bill; that by said cross-bill the said cross complainants alleged, among other things, that they were, and for a long time prior thereto, had been the owners of certain rights in the waters and to the use thereof of the said Walker River and certain appropriations made by them, their grantors, and predecessors in interest, and further alleged that, within three years next before the filing of said cross-bill, said Thomas B. Rickey had diverted the waters of the said Walker River, at divers places on said river above the lands of said cross complainants and above the point at which said cross complainants so diverted the same, and that a large portion of the waters so diverted by the said Thomas B. Rickey are never returned to the said river, and that he is continuing the diversions aforesaid and thereby has deprived and is depriving the said cross complainants of a large portion of said water to which they are so entitled. That it is further alleged in said cross-bill that each of the

said diversions so made by the said Thomas B. Rickey is without right, but that said Thomas B. Rickey has so diverted the said water and is diverting the same under claim of right so to do and adversely to said cross complainants, and the said cross complainants, in this paragraph mentioned, prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River above the points where the said cross complainants in this paragraph mentioned so divert the same, in such manner or to such extent as to deprive said cross complainants in this paragraph mentioned of any of the water so claimed by said cross complainants.

IX.

That on the 20th day of December, 1904, the said Chas. Johnston filed in the Circuit Court of the United States for the district of Nevada, in the said suit so originally brought by the said Miller & Lux against the said Thomas B. Rickey and others, his cross-bill, in and by which cross-bill the said cross complainant alleged, among other things, that he was, and for a long time prior thereto, had been, the owner of certain rights in the waters and to the use thereof of the said Walker River and certain appropriations therein made by him, his grantors and predecessors in interest, and further alleged that within three years next before the filing of said cross-

- bill the said Thomas B. Rickey had diverted the water of the said Walker River in divers places on the said river above the lands of said cross-complainant and above the point at which said cross-complainant so diverted the same. That a large proportion of said water so diverted by said Thomas B. Rickey is never returned to the said river and
- that the said Thomas B. Rickey is continuing the diversions aforesaid and has thereby deprived and is depriving the said cross-complainant of a large proportion of the water to which the cross-complainant
 - is entitled, and further in said cross-complaint alleged that each of said diversions so made by the said Thomas B. Rickey is without right and that he has so diverted said water and is so diverting the same under claim of right so to do and adversely to said cross-complainant, and therein and thereby the said cross-complainant prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River above the points where the said cross-complainant so diverted the same in such a manner or to such extent as to deprive said cross-complainant of any of the water so claimed by said cross-complainant.

X.

That on the 20th day of December, 1904, the Circuit Court of the United States for the district of

Nevada issued its writs of subpœna in said cross-suit upon said cross-bills directed to the said Thomas B. Rickey, and thereafter on the said 20th day of December, 1904, the said writs of subpœna were duly served by the marshal of the district of Nevada upon the said Thomas B. Rickey.

XI.

That on the 4th day of January, 1905, the said cross-complainants, Henry Wood, James O. Birmingham, Charles Snyder and Chas. Johnson, commenced this action in the Circuit Court of the United States for the district of Nevada as an ancillary proceeding and action to the said cross-complaints in said original action of *Miller & Lux vs. Thomas B. Rickey et al*, to restrain the Rickey Land and Cattle Company from prosecuting the two actions so commenced by the said Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, alleging, in the complaint in said ancillary action, that said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston were citizens of the State of Nevada, that the Rickey Land and Cattle Company was a corporation organized and existing under the laws of the State of Nevada and has its principal place of business at Carson City, in the County of Ormsby, in the State of Nevada, and is a citizen of the State of Nevada, and further alleged that the necessary effect of the

said actions so commenced in the Superior Court of Mono County, was to bring on, for trial and determination in said Superior Court of the State of California, the same issues presented by the said cross-complaints aforesaid, so far as relates to the issues therein between the said cross-complainants and the said Thomas B. Rickey, and further alleged that the purpose of said actions commenced in Mono County was to obtain from the said Superior Court of the State of California a judgment determining said issues in advance of the determination of the same by the United States Circuit Court for the district of Nevada, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada in the said suit, to try and determine said issues made by the said cross-complaints, and hinder and embarrass said Circuit Court for the district of Nevada in the trial of the said issues made by said cross-complaints and in the enforcement of any decree which said United States Circuit Court for the district of Nevada may render upon the issues presented by said cross-complaints so pending before it; and it was further alleged in complainant's bill of complaint herein that the further prosecution of said actions, or either of them, brought by the Rickey Land and Cattle Company in Mono County would be in derogation of the jurisdiction of the United States Circuit Court for the district of Nevada, and of the right of the said cross-complainants; and in

said complaint herein it was prayed by the said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, that the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them, or either of them, be enjoined and restrained from further prosecuting, as against said cross-complainants, either of the said actions so brought by the Rickey Land and Cattle Company in the said Superior Court of the County of Mono, and from taking any further steps in said action, as against said cross-complainants.

XII.

That pursuant to the said prayer of said complaint in said ancillary action, the United States Circuit Court for the district of Nevada made its order that the said defendant, the Rickey Land and Cattle Company, a corporation, should show cause before said Court why an injunction should not issue, pending said suit, according to the prayer of the complainant in said ancillary suit. The said Rickey Land and Cattle Company, pursuant to the said order to show cause, filed affidavits in said Court and the said hearing upon said order to show cause came on regularly before the said United States Circuit Court for the district of Nevada, and on the 25th day of June, 1906, an interlocutory decree was made and entered in this case by the United States Circuit Court for the district of Nevada, wherein it was ordered, adjudged,

and decreed that the said defendant, the Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them, or any of them, be, and they are hereby enjoined and restrained from further prosecuting, as against said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, either of the two actions brought by the said Rickey Land and Cattle Company in the Superior Court of Mono County, and from taking any further steps whatever in either of the said actions, pending the final hearing and determination of this ancillary suit, and until further order of the said Court.

XIII.

That thereafter, in due and proper season, an appeal was presented by the Rickey Land and Cattle Company to the Circuit Court of Appeals for the Ninth Circuit from the said interlocutory decree, and all necessary and proper steps were taken for the prosecution of the said appeal and the hearing of the same; that in due and proper season said appeal came on to be heard, and the same was heard by the said Circuit Court of Appeals for the Ninth Circuit, and after the hearing thereof the said interlocutory decree appealed from was affirmed by the said Circuit Court of Appeals on the 4th day of March, 1907, and a decree to that effect was thereupon entered. That the said Rickey Land and Cattle Com-

pany thereafter, in due time, filed with the said Circuit Court of Appeals a petition for a re-hearing of the aforesaid appeal, which said petition for re-hearing was, on the 20th day of May, 1907, denied by the said Circuit Court of Appeals. That a true and correct transcription of the record on appeal in said case, together with a copy of the decree of the said Circuit Court of Appeals affirming the decree appealed from, and also a copy of the opinion of the said Circuit Court of Appeals rendered thereon are herewith produced and filed in this Court.

XIV.

We respectfully submit that the Circuit Court of Appeals was in error in affirming the decree of the United States Circuit for the district of Nevada for the following reasons:

1. The cross-complaints, and each of them, wherein said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, district of Nevada, the rights of said cross-complainants to the use of the water of Walker River, as between the said cross-complainants and Thomas B. Rickey, upon which said cross-complaints, said order and decree appealed from, was predicated, was not a proper cross-complaint in the original action of *Miller & Lux vs. Thomas B. Rickey*, or as against Thomas B. Rickey, because said rights sought to be determined between each of the

said cross-complainants in said cross-complaint as against Thomas B. Rickey, were in no manner defensive to the main action of *Miller & Lux vs. Thomas B. Rickey* and said cross-complainants and others, nor was the determination of the controversy sought to be made by said cross-complaints between said cross-complainants and said Thomas B. Rickey necessary in order that either of said cross-complainants might make a full and complete defense of all rights of said cross-complainants in the said cause of *Miller & Lux vs. Thomas B. Rickey* and said cross-complainants and others.

2. The cross-complaints of the complainants herein filed by them in the action of *Miller & Lux vs. Thomas B. Rickey* and said cross-complainants and others, wherein the said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, district of Nevada, the rights to the use of the water of the Walker River between said cross-complainants and Thomas B. Rickey, upon which said cross-complaints were predicated, was not a proper cross-complaint in said action of *Miller & Lux vs. Thomas B. Rickey* and others, because the said controversy made between said cross-complainants and Thomas B. Rickey was a controversy between residents of the same State, to wit, residents of the State of Nevada, and the said controversy and the determination of said controversy between said cross-complainants and

Thomas B. Rickey was in no way necessary or pertinent to the full determination of the defense of either of the said cross-complainants in said suit of *Miller & Lux vs. Thomas B. Rickey* and said cross-complainants and others, and neither of the said cross-complaints was in any manner ancillary to said suit of *Miller & Lux vs. Thomas B. Rickey* and said cross-complainants and others, and the said Circuit Court of the United States, Ninth Circuit, district of Nevada, had no jurisdiction to determine the controversy sought to be made by each of said cross-complainants between said cross-complainants and said Thomas B. Rickey, all of whom are residents of the State of Nevada.

3. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff therein, the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River in the State of California, and to procure a judgment from the Superior Court of Mono County, State of California, quieting the title of the Rickey Land and Cattle Company, a corporation, to certain waters and the use thereof of the Walker River in the State of California, as against the said plaintiffs herein and others, and the said suit of *Miller & Lux vs. Thomas B. Rickey* and others in the Circuit Court of the United States, Ninth Circuit, district of Nevada, was brought to enjoin Thomas B. Rickey and the said complainants herein

from diverting the waters of said Walker River, and therefore the judgment of the Circuit Court for the district of Nevada should not have been affirmed, because no proceeding which had been taken, or any proceeding which might have been taken, or any judgment which might have been rendered in the Superior Court of Mono County in said action commenced and prosecuted therein, could in any manner, way or form impair, infringe upon, or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, district of Nevada, in the said case of *Miller & Lux vs. Thomas B. Rickey* and others, including the complainants herein, nor could the same in any manner, way or form impair, infringe upon, or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, district of Nevada, in the said case of *Miller & Lux vs. Thomas B. Rickey* and others, including the plaintiffs herein, so far as either of said complainants herein had a right to invoke the powers of the said Circuit Court of the United States, Ninth Circuit, district of Nevada.

4. The Rickey Land and Cattle Company was not a party to said action of *Miller & Lux vs. Thomas B. Rickey*, commenced in the United States Circuit Court, Ninth Circuit, district of Nevada, and will not be bound under the doctrine of *lis pendens* by the judgment or decree rendered therein, in so far as it was the successor of Thomas B. Rickey in and

to the water, and right to the use of the water of the Walker River in the State of California, and therefore the Rickey Land and Cattle Company should not have been restrained from prosecuting the actions in Mono County, State of California, to quiet its title thereto.

5. That the said Circuit Court of the United States, Ninth Circuit, district of Nevada, had no jurisdiction to try and determine the rights to the use by Thomas B. Rickey of the waters of the Walker River in the State of California, nor the title of Thomas B. Rickey to the waters of the Walker River in the State of California, nor the use by the Rickey Land and Cattle Company, a corporation, of the waters of the Walker River in the State of California, nor the title of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California in said action of *Miller & Lux vs. Thomas B. Rickey et al.*, and therefore have no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of Thomas B. Rickey to the use of said water, or the right to the use of said water, because the water was in the State of California, and the use and diversion of said water was made by said Thomas B. Rickey and the said Rickey Land and Cattle Company, his successor, in the State of California, and the said water, and the land upon which the use of said water was made was all in the State of California, and not

in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, district of Nevada, has no jurisdiction to try the rights of said Rickey Land and Cattle Company to the use of the waters in the Walker River in the State of California, or the title of the Rickey Land and Cattle Company to the use of the waters in the Walker River in the State of California as the successor of Thomas B. Rickey.

The questions in this appeal involved are of great importance and concern. The water used for irrigation is consumed throughout the western portion of the United States, where irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The streams from which water is received, in many instances have their source in one State, and in the course of the stream it flows through a part of the State in which it has its source, and thence into and through another State. Along the course of such streams, throughout their length, are constructed ditches and canals, into which is diverted water for the purpose of irrigation. Some of such ditches are located in the State embracing the upper reaches of the stream, and others divert the water from such stream in the State embracing the lower reaches of the stream. The certainty of title or right to the use of the waters, and the priority of right to the use of the waters, is as essential to the prosperity of these farming neighborhoods as is the

certainty of the title to the lands upon which the water is used. There is a multitude of streams which flow in, or through, more than one State and furnish water for the irrigation of the lands bordering on, or adjacent, to the stream, and in some instances the water is taken from the stream and conveyed long distances to be applied for the irrigation of the lands. Millions of dollars are at present invested in irrigating ditches and canals, which divert water from such so-called "interstate" streams, and millions more are invested in farming enterprises dependent upon the water of such canals and ditches.

The prosperity of the entire western population of this country is directly and closely connected with the use of water for irrigation. So much so is this the case, that the distribution of the water for irrigation upon arid lands has been the subject of Congressional enactments. It is of paramount importance that the question of the jurisdiction of the Courts to determine the respective rights of the water in such interstate streams should be put at rest.

This is the first reported case in the Federal Courts, where the Circuit Court having its district in the State through which the lower reaches of the stream flow, has asserted jurisdiction to enjoin a diversion of the water in the other State through which the upper reaches of the stream flow.

It is therefore proper and important that this case receive the judgment of the Supreme Court of the

United States to determine this important question of jurisdiction.

In this particular case many of the defendants have filed separate cross-bills. These cross-bills present issues as to the priority of rights to the use of the water between the several defendants. If these cross-bills are entertained, and the issues made by the cross-bills and the original bill are tried, the constant attention of the trial Court for many months must be had, and many thousands of dollars of cost to the litigants must be expended before a decision is reached, which decision, when rendered, may be of absolutely no force because of the lack of jurisdiction in the Court.

The questions involved in this appeal are of great importance and concern. As it should finally be determined by the Court of last resort whether the jurisdiction of the United States Court in one of the States of the Federal Union is infringed and interfered with by an action begun and prosecuted in the State court of another State embracing the upper reaches of the stream, for the purpose of quieting the title to the water of such stream flowing in the latter State, for use upon lands lying in and riparian to the stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there has, prior to the commencement of the action in the State court, been

commenced a suit against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

That in each instance where the jurisdiction of the United States Circuit Court for the district of Nevada has been affirmed in this case, the judgment of the Court has been asserted upon a different ground, and in some particulars the grounds of the different decisions have been inconsistent. In this respect we call attention to the fact that on the plea to the jurisdiction in the original action the Court sustained its jurisdiction upon the ground that it had personal jurisdiction of the defendant, Thomas B. Rickey, and held that the action was of a transitory nature. The same Court, when enjoining the prosecution of the actions in Mono County, held that the action was of a local character and that the United States Circuit Court for the district of Nevada could quiet the title to water in the State of California. In the United States Circuit Court of Appeals for the Ninth Circuit the locus of the water is held to be the same as that of the land of Miller & Lux in the State of Nevada, upon the assumption that the land and all its appurtenances have the same identical location.

The questions involved in this appeal are also of great public importance and concern inasmuch as the said Henry Wood, James O. Birmingham, Chas.

Snyder, and Chas. Johnston, cross-complainants, are all residents of the same State with T. B. Rickey, the cross-defendant, and the jurisdiction of the United States Circuit Court for the district of Nevada is invoked by cross-bill to try controversies exclusively between them as to the prior right to the use of water, and that, too, while cross-complainants admit the claims to the use of the water asserted by the complainant Miller & Lux in the action, and when the cross-complainants allege their use and diversion and right to the water in the State which constitutes the district of the United States Court, and allege the use and diversion of water by the defendant, T. B. Rickey, under a claim of right so to do, in another State higher up on the same stream.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals affirming the decree of the Circuit Court of the United States, Ninth Circuit, district of Nevada, is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of, and under the seal of this Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding the said court to certify and serve to

this court on a day certain to be therein designated, and full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled the *Rickey Land and Cattle Company, a corporation, Appellant, vs. Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnston, Appellee, No.*, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the act of Congress, entitled An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes. Approved March 3, 1891.

That your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this honorable Court. And your petitioner will ever pray.

THE RICKEY LAND AND CATTLE COMPANY,

By *Thomas B. Rickey* . . .
President.

F. D. MCKENNEY.

JAMES F. PECK,

CHARLES C. BOYNTON,

Solicitors for Petitioner.

State of California,
City and County of San Francisco—ss.

Chas. C. Boynton being duly sworn, says:

That he is one of the counsel for the Rickey Land and Cattle Company, a corporation, petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Chas. C. Boynton

Subscribed and sworn to before me this *17th*
day of *February*.....190*8*

My commission expires on the *12th* day of
April....., 190*9*

seal

Flora Hall.....

Notary Public in and for the City and County of
San Francisco, State of California.

~~State of California,~~

~~City and County of San Francisco—ss.~~

Thomas B. Rickey, being duly sworn, states that he is the President of the above-named petitioner, The Rickey Land and Cattle Company, and as such President, has full knowledge of its business affairs,

and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Thomas B. Rickey

Subscribed and sworn to before me this *14th*
day of *October*....., 1907.

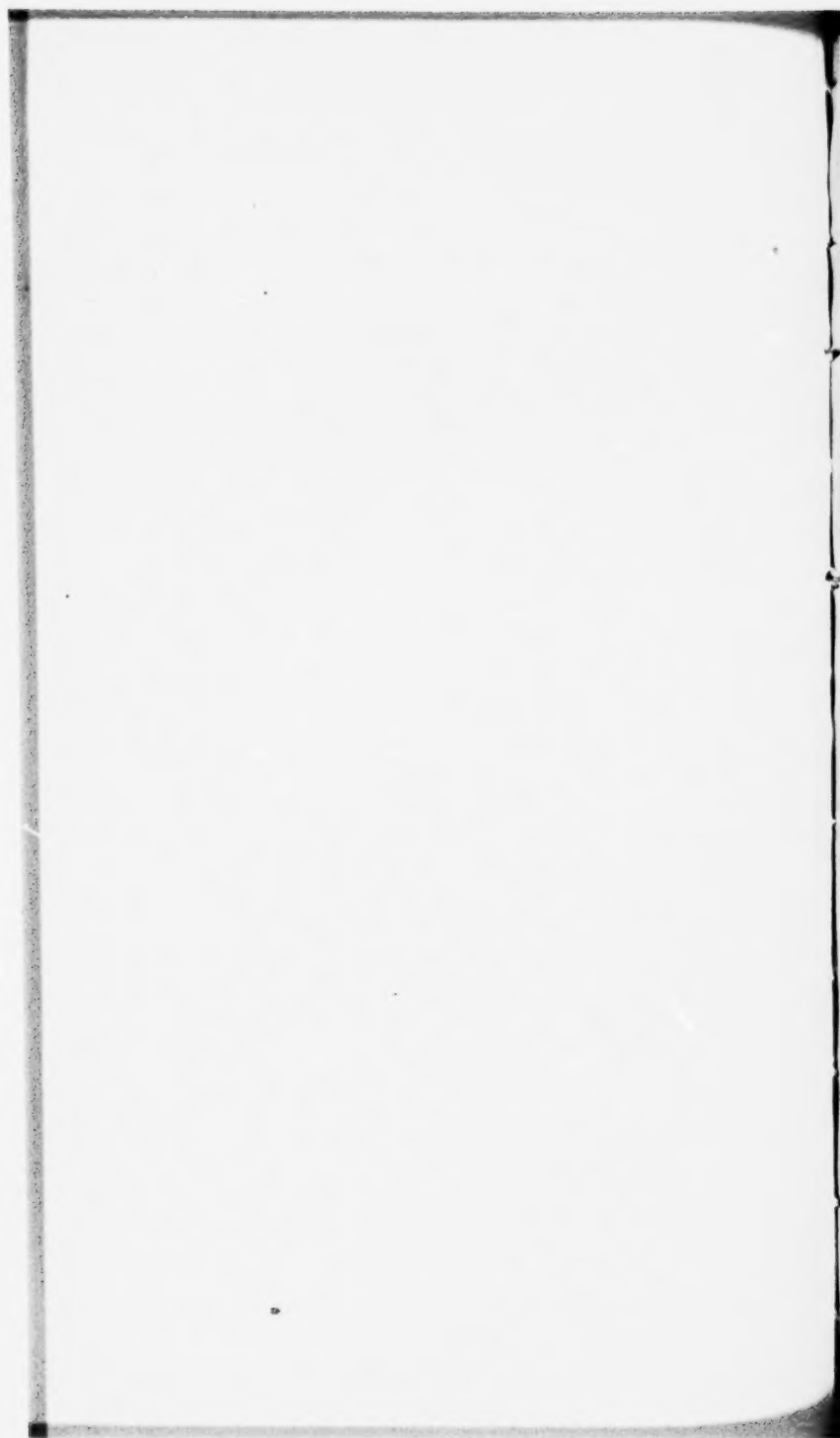
L. H. Peters

Notary Public in and for the ~~City and County of~~ *Orin*
~~San Francisco~~, State of ~~California~~ *Nevada*

I hereby certify I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petitioner should be granted by this Honorable Court.

Chas. C. Boynton

Counsel for Rickey Land and Cattle Company.



Office Supreme Court, U.

FILED.

MAR 4 1908

JAMES H. McKENNEY

CLERK

No. ~~6000~~ ~~3000~~ ~~7000~~

IN THE
Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

**HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER and CHARLES JOHNSTON,**
Respondents.

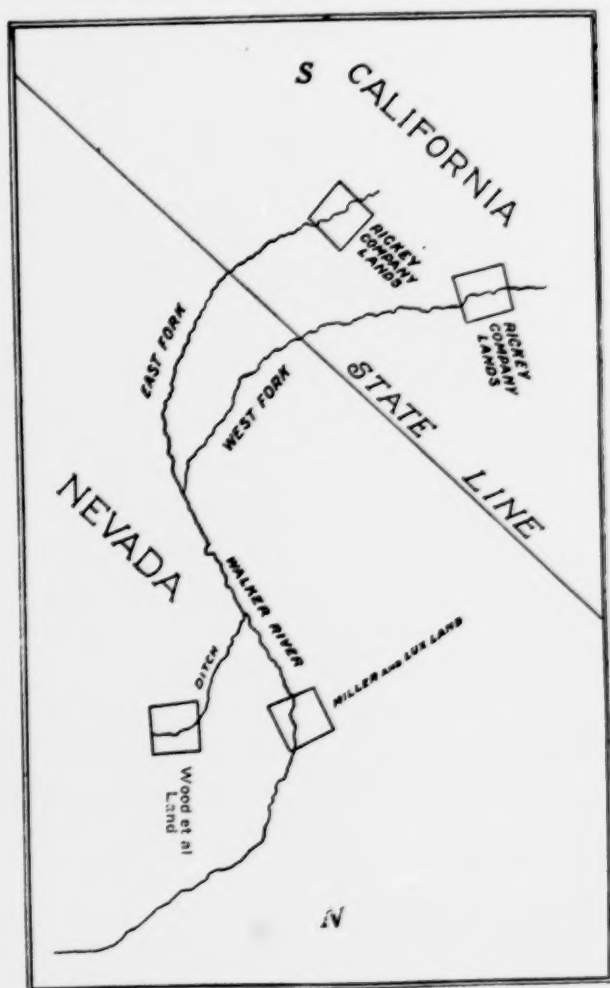
**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

F. D. MCKENNEY.

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Petitioner.



IN THE
Supreme Court of the United States

OCTOBER TERM

RICKEY LAND AND CATTLE
COMPANY, a Corporation,

Petitioner,

vs.

HENRY WOOD, JAMES O. BIR-
MINGHAM, CHARLES SNY-
DER AND CHARLES JOHN-
STON,

Respondents.

Brief in Support of Petition for Writ of Certiorari.

This petition is prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for prosecuting two actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the prosecution of said actions would be to bring on for trial and determination the same issues as thereafter were presented by a cross

bill filed by respondents in a certain action theretofore brought by one Miller & Lux against one T. B. Rickey in the United States Circuit Court for the district of Nevada, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the Plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California to irrigate its said lands (Trans., p. 8, 13).

Miller and Lux, a California corporation, owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in

the State of Nevada to irrigate said lands (Trans., p. 5).

Respondents own certain lands in the State of Nevada, marked on the plat Wood et al., lands being somewhat higher up on the stream than the lands of Miller & Lux, and claim a right to divert waters from said Walker River in the State of Nevada for the purpose of irrigating these lands (Trans., p. 14). Both petitioner and respondents herein are citizens of the State of Nevada.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the district of Nevada against one Thomas B. Rickey and 137 other defendants, including respondents, and allege that it was the owner, by appropriation, of certain rights in the waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of waters to which it was entitled (Trans., pp. 3 and 4).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the district of Nevada, setting up the facts that the Walker River rises in the State of California and flows therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irri-

gation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker River in the State of Nevada (Trans., p. 3).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the district of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 3).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, including respondents herein, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 8-11).

Subsequent thereto and on the 20th day of December, 1904, respondents herein filed a cross bill against T. B. Rickey in the original action commenced by

Miller & Lux against T. B. Rickey et al. in the United States Circuit Court for the District of Nevada (Trans., p. 14).

Respondents alleged in said cross-bills that they owned certain rights and appropriations in the waters of Walker River, in the State of Nevada, on which rights their co-defendant, T. B. Rickey, was trespassing. Wherefore an injunction against said T. B. Rickey was prayed (Trans., p. 14).

Thereafter respondents brought this action in the United States Circuit Court for the district of Nevada to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the two last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were presented by the cross-bills of complaint filed by respondents in the said original action of *Miller & Lux vs. T. B. Rickey*, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court under the cross-bills in the original action, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada (Trans., pp. 17, 18). An interlocutory order and decree restraining appellant herein from prosecuting said actions in the California court was thereafter entered (Trans., p. 64), and from such order and

decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed.

This writ is prayed for in order to have said decree reviewed by this honorable court.

PUBLIC IMPORTANCE OF QUESTIONS INVOLVED.

Preliminary to the discussion of the grounds where-in we contend that the Court of Appeals erred in making its decree herein, we submit the following brief statement of the great public importance and concern of the questions involved in this appeal.

In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams have their source in one State and in their course flow through that State into and through another State, and furnish water used for irrigation in both States along their course. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent upon the waters of these streams and canals. The prosperity of the entire

western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States Courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flow, it is important that this court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the court occupied by what may ultimately prove to be a purposeless trial.

We further submit that the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

In this case the question of the sovereignty of a State over the realty within its boundary is directly involved. If the courts of one State have jurisdiction to adjudicate directly as to and bind the titles to real property in another State, there is nothing left to the sovereignty of the latter State except a shell. A State acting within constitutional limitations is supposed to be absolute in the enactment and enforcement of laws governing the title to real property situate within

that State. But if foreign courts, in no way responsible to the people of a State, have power to adjudicate directly as to and bind titles to realty in the State, none of the attributes of sovereignty remain except the name. That is one of the vital questions that form the basis of this appeal.

The questions involved in this appeal are also of great public importance and concern, inasmuch as Henry Wood, J. O. Birmingham, Chas. Snyder, and Chas. Johnson, cross-complainants, are all citizens of the same State with T. B. Rickey, the cross-defendant, and the jurisdiction of the United States Circuit Court for the district of Nevada is invoked by cross-bills to try controversies exclusively between them, as to the prior right to the use of the water, and that, too, while cross-complainants admit the claims to the use of the water by the complainant, Miller & Lux, in the action, and when the cross-complainants allege their use and diversion and right to the water in the State which constitutes the district of the United States Court and allege the use and diversion of the water by the defendant, T. B. Rickey, under a claim of right so to do, in another State higher up on the same stream.

There are three questions involved in this appeal.

First, as to the jurisdiction of the United States Circuit Court for the district of Nevada in a local ac-

tion over water rights in the California portion of a stream, which stream rises in and flows through and out of the State of California into and through the State and District of Nevada.

Second, assuming that the United States Circuit Court for the district of Nevada, in a local action over water rights, has jurisdiction of rights in the California portion of the stream, the second question is as to the jurisdiction of the said court over a controversy between co-defendants in said original action, all citizens of the same State, initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights in the stream in California claimed to be owned by the former co-defendant, the cross-complainant.

Third, assuming that the said United States Circuit Court for the district of Nevada, in such a local action, has jurisdiction over water rights in the California portion of the stream, and assuming that the said United States Circuit Court has jurisdiction over a controversy initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights claimed by said former co-defendant in the stream, yet, if, prior to the filing of such cross-bill, the said cross-defendant shall have commenced an original action in the State Court of the State of California to quiet his title to rights in the stream in the State of California against cross-com-

plainant, is not the jurisdiction acquired by the Court of the State of California in the actions so commenced superior and exclusive over the subject matter and controversies between the parties to that action to any which was afterward sought to be vested in the Federal Court for the district of Nevada by filing the cross-bills therein?

These three propositions will be discussed in their order.

I.

THE FIRST QUESTION IS AS TO THE JURISDICTION OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA IN A LOCAL ACTION OVER WATER RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, WHICH STREAM ARISES IN AND FLOWS THROUGH AND OUT OF THE STATE OF CALIFORNIA INTO AND THROUGH THE STATE AND DISTRICT OF NEVADA.

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were thereafter presented by the cross-bills filed by respondents in the United States Circuit Court of Nevada in said original action of *Miller & Lux vs. T. B. Rickey et al.* (Trans., pp. 17-18).

We desire to argue a single proposition, viz., THAT THE ACTIONS COMMENCED BY PETITIONER IN CALI-

FORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE CROSS-BILLS FILED BY RESPONDENTS IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS, or vice versa.

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court must necessarily be situate exclusively within the State of Nevada, and thus the only issues presented by said cross-bills in said action are as to respondents' title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California can not be the same issues as are presented in the Nevada action, which are as to the title to a different realty, situate in Nevada.

Both the actions commenced by respondent

filing the cross-bills in the State of Nevada and the two actions commenced by petitioner in the State of California were actions to establish and quiet title to real property and were local actions, and each action was local to the State wherein it was brought. This doctrine, with which we fully agree, was announced by the Court of Appeals in this case, (see *Rickey Land and Cattle Company vs. Miller & Lux*, 152 Fed., 11) and is supported by the authorities cited in the opinion, as well as by the leading case of *Northern Indiana R. R. vs. Michigan Central R. R. Co.*, 15 How., 233, and by the following authorities as well:

- Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, 83; No. 13446;
- Morris vs. Remington*, 1 Parsons (Penn.), 387;
- Gould on Waters*, 3d. Ed., par. 445;
- Bumps on Fed. Prac.*, p. 138;
- Angel on Watercourses*, 7th Ed., par. 418;
- Enc. of Pleading and Practice*, Vol. 22, p. 1158;
- Bouvier's Law Dictionary*, p. 66, par. 9;
- Gould on Pleading*, p. 114;
- The Company of the Mersey vs. Irwell Mfg. Co.*, 2 East, 498;
- United States vs. Rio Grande Dam, etc., Co.*, 174 U. S., 690;

Bates' Fed. Eq. Pro., par. 71;
United States vs. Winans, 73 Fed., 72;
Pomery Eq. Jrsp., Sec. 298;
Mississippi & Mo. R. R. Co. vs. Ward, 67
 U. S., 485.

It is universally held that the jurisdiction of a court in a local action is confined to a subject matter situate within the territorial limits of the court's jurisdiction.

Northern Indiana R. R. Co. vs. Mich. Central R. R. Co., 15 Howard, 233;
Livingston vs. Jefferson, 1 Brock, 203, Fed. Case No. 8411;
McKenna vs. Fiske, 1 Howard, 241;
Massey vs. Watts, 6 Cranch, 148;
Conant vs. Deep Creek Irrigation Co., 23 Utah, 627, 66 Pac., 188;
Davis vs. Headley, 22 New Jersey Equity, 115;
Carpenter vs. Strange, 141 U. S., 105;
Guaranty Trust Co. vs. Delta Co., 104 Fed., 5;
Story on Conflict of Laws, 7th Ed., Sec. 5433, p. 685;
Watts vs. Waddle, 6 Peters, 389;
Watkins vs. Lessee, 16 Peters, 25;
Corbett vs. Nutt, 10 Wallace, 457;
Boyce vs. Grundy, 9 Peters, 275;

- Baltimore Association vs. Alderson*, 90 Fed., 142;
Farmers' Loan & Trust Co. vs. Northern Pacific Railroad, 69 Fed., 871;
Bates' Fed. Equity Procedure, Secs. 70-75;
Texas & Pacific Railroad Co. vs. Gray, 86 Texas, 571;
Pine vs. New York, 185 U. S., 93;
People vs. Central R. R. Co., 42 N. Y., 283.

The distinction between local and transitory actions exists as much in determining the jurisdiction of courts of equity in equitable proceedings as it does in courts of law in legal proceedings. This doctrine was also announced by the Court of Appeals in this case. See *Rickey Land and Cattle Company vs. Miller & Lux*, 152 Fed., p. 11.

See also,

- Wharton, Conflict of Laws*, 2d ed., 282, 288;
Lewin on Trusts, vol. I, p. 129, star pages 48-49;
Morris vs. Chambers, 29 Beaver, 246, same, 3 De G. and F., 583;
Dicy on Conflict of Laws, p. 214;
Harris vs. Harrison Law Rep., 8 Chancery Appeals, 342;
Jenkins vs. Lester, 131 Mass., 355;
Bates on Fed. Equity Pro., Vol. 1, Sec. 75;

- Huntington vs. Atrol*, 146 U. S., 656;
Greeley vs. Low, 155 U. S., 58, 76;
Northern Indiana Railroad Co. vs. Mich. Central Railroad Co., 15 Howard, 233;
Miss. & Missouri Railroad Co. vs. Ward, 67 U. S., 485;
Pomeroy, Equity Jurisprudence, 2d ed., Vol. 1, Sec. 298 and Sec. 1318;
Story's Conflict of Laws, 7th ed., Sec. 534, p. 685;
Stillman vs. White Rock Manufacturing Co., Fed. Cases, No. 13,446;
Morris vs. Remington, select equity cases, Parsons, 387;
Gould on Waters, Sec. 446;
Atlantic Dredging Co. vs. Berge neck Railroad Co., 44 Fed., 208;
Story, Equity Jurisprudence, 12th ed., Sec. 774;
People vs. Colorado Railroad Co., 42 Fed., 638;
Atlantic & Tel. Co., 46 New York Sup. Ct., 377;
Western Union Telegraph Co. vs. Western Railroad Co., 8 Baxter, Tennessee, 54;
Marshall vs. Turnbull, 34 Fed., 827;
Western Union Telegraph Co. vs. Pacific & Atlantic, 49 Illinois, p. 90;
Fargo vs. Redfield, 22 Fed., 373-375;

- Port Royal Railroad Co. vs. Hammond*, 58 Georgia, 523;
Montgomery vs. Commercial Bank, 1 S. and M. and Ch., 632;
Northfork Railroad Co. vs. Postal Telegraph Co., 88 Virginia, 396;
Linsey vs. Silver Star Mining Co., 66 Pac., 382;
Texas & Pac. Railroad Co. vs. Gay, 86 Texas, p. 571;
Guarantee Trust Co. vs. Deta & P. L. Co., 104 Fed., 5;
Baltimore B. N. L. Ass'n vs. Alderson, 90 Fed., 142;
Carpenter vs. Strange, 141 U. S., 87;
Farmers' Loan Trust Co. vs. No. Pac. Railroad Co., 69 Fed., 871;
Washburn Easements, 3d ed., 692;
Smith's Leading Cases, p. 1064;
Encyclopedia of Pleading and Practice, Vol. 14, pp. 1122, 1125-1126, 1106;
Gould on Waters, 3d ed., Sec. 444;
Angel on Watercourses, 7th ed., Sec. 418;
Johnson vs. Superior Court, 65 Cal., 567;
Gilbert vs. Water Power Co., 19 Iowa, 319;
People vs. Central Railroad Co. of N. J., 42 N. Y., 283;
Wood on Nuisances, 3d ed., Sec. 830;
Gilbert vs. Water & Power Co., 19 Iowa, 319;

Elred vs. Ford, 36 Wis., 530;
Horn vs. City of Buffalo, 49 Hun., 76;
Buck vs. Ellenbolt, 84 Iowa, 394.

These actions being to quiet title to real property, and the issues presented thereby being as to the title to the realty that constitutes the subject matter of the respective actions, in order to sustain the decree herein which is based on the finding that the same issues were presented by the California actions as were thereafter presented by the cross-bills in the Nevada action, IT MUST APPEAR THAT THESE RESPECTIVE ACTIONS HAD SOME COMMON SUBJECT MATTER OVER WHICH THE NEVADA COURT AND THE CALIFORNIA COURT HAD CONCURRENT JURISDICTION.

From the very nature of local actions and the limitations on the jurisdiction of these respective courts created by the Constitution and the laws of Congress set out and referred to in the foregoing authorities, it is a manifest impossibility for there to be a common subject matter, real property, over which in local actions courts, either State or Federal, sitting in different States, can have concurrent jurisdiction.

The only statute that we have been able to find that extends the jurisdiction of a Federal court in a local action so that it may in any case include a subject matter outside of its district, is contained in Sec. 742, Rev. Sts., which reads as follows:

"Any suit of a local nature, at law or in equity,

where the land or other subject matter of a fixed character lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in the Circuit or District Court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause *mesne* or final process to be issued and executed as fully as if the said subject matter were wholly within the district for which such court is constituted."

In no instance has the jurisdiction of courts, either State or Federal, been extended so that courts sitting in different States could have concurrent jurisdiction in a local action over a common subject matter situated either wholly in one State or wholly in the other State, or partly in one State and partly in the other.

Therefore, these actions being local actions to quiet the title to real property, it is inherently impossible that the same issues be presented in the actions brought by petitioner in California as were presented by the cross-bills filed by respondents in Nevada.

This petition might be submitted on the foregoing statement of these broad general principles on which all courts are in accord. But in view of the importance of the interests herein involved, and of the wide-reaching public importance of a decision finally determining the limits of the jurisdiction of the Federal Courts in actions involving water rights in interstate streams, we will respectfully submit the prop-

ositions herein set forth to a more minute and careful analysis.

In the discussion which will immediately follow, it will be assumed that the rights of both parties to the water of the stream stand on a parity. That is to say that both base their rights to the water upon appropriation. This is not, however, the case. The laws of the State of California confer rights upon the owners of riparian lands to use the water, and the right is not determined by priority of use, as are the rights between appropriators. In fact, the right to use water by riparian owners in California is not dependent upon actual use. *Lux vs. Haggin*, 69 Cal., 255, while in Nevada the law is entirely of appropriation.

When, therefore, in the discussion, we place the rights of both parties upon the basis of appropriation, we are in a measure surrendering the advantage of position. In reviewing the decision of the Court of Appeals, we will call attention to this difference in the laws of the two States.

Putting aside for the time any consideration of the effect of rules limiting the jurisdiction of courts, what, in the broadest sense, are the property rights described by the facts set out in the bills of complaint filed in the courts of Nevada and California, respectively?

Briefly, respondents, in their cross-bill filed in the

United States Circuit Court of Nevada, state facts showing the ownership of a right to divert and use for irrigation, certain water of the Walker River in Lyon County, Nevada (Trans., pp. 14-15). The primary elements of such a water right in a natural stream are:

First, the right to have the water flow, unimpaired in quality or quantity, from its source, down the stream to the point of diversion.

Second, of the right to divert the water from the stream when it reaches his point of diversion.

Cole vs. Richards (Utah), 75 Pac., 376;

Black's Pomeroy on Water Rights, par. 64;

Farnham on Waters & Water Rights, fol. 3,
Sec. 674;

Phoenix Water Co. vs. Fletcher, 23 Cal., 482.

The right of the appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet it is a substantial right and interest in the stream itself which courts will protect.

Black's Pomeroy on Water Rights, Sec. 64;

Duckworth vs. Watsonville W. & L. Co.
(Cal.), 89 Pac., 338;

Cole vs. Richards (Utah), 75 Pac., 376.

in which case the Court said:

"It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, *the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained*, and any interference with the stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

Taken most broadly and construed most liberally in its favor, respondents' rights, acquired by their appropriations from this stream in Nevada, consist:

First, of the right to have the water of the Walker River flow, to the extent of respondents' appropriation, unimpaired in quantity or quality, from its source in the State of California, down through the State of California toward respondents' point of diversion as far as the California State line.

Second, of the right to have the water of the Walker River to the extent of respondents' appropriation, flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondents' point of diversion.

Third, of the right to divert the water when it reaches the point of diversion.

That the courts of California will protect respondents' right to have the water of the Walker River flow from its source, down through the State of California toward its point of diversion as far as the Nevada line, has been held in

Howell vs. Johnson, 89 Fed., 559;

Morris vs. Bean, 123 Fed., 618;

Hoag vs. Eaton, 135 Fed., 411;

Anderson vs. Bassman, 140 Fed., 14-20.

That the courts of the State of California have no jurisdiction to protect, determine, or affect respondents' right to have the water of Walker River flow from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to its point of diversion, or respondents' right to divert the water when it reaches its point of diversion in Nevada, is unanswerably announced in

Conant vs. Deep Creek Irrigation Co., 23 Utah, 627, 66 Pac., 188;

Lamson vs. Vailes, 27 Colo., 201, 61 Pac., 231.

These authorities hold that to be the exclusive function of the courts of the State of Nevada.

Likewise, we submit, the courts of Nevada, State or Federal, have no jurisdiction to protect, deter-

mine, or affect respondents' right to have the water of Walker River flow from its source in the State of California down through the State of California. That is the exclusive function of the courts of the State of California. The courts of California possess, and will exercise that function.

Howell vs. Johnson, supra;
Morris vs. Bean, supra;
Hoag vs. Eaton, supra;
Anderson vs. Bassman, supra.

That the courts of Nevada do not possess, and can not exercise the function of determining and protecting rights in the California portion of the stream, we submit as the first pivotal point in this case.

Turning to the rights of petitioner involved, as the subject matter in the actions brought by petitioner in the Superior Court of California, as described in the complaints, they consist of a water right in the Walker River in the State of California (Trans., pp. 8-13). This right, as we have seen in its elemental parts, consists:

First: Of the right to have the waters of the stream flow from its source down through the State of California unimpaired in quantity or quality to petitioner's point of diversion in the State of California.

Second: Of the right to divert the water at that point.

This is a right the Superior Court of California can protect, and an action to quiet title to this right was properly brought in said Superior Court. But it is obviously manifest that petitioner could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to this water right in the State of California. A judgment of a Nevada court quieting title to real property in the State of California would be a mere nullity. Yet complainants, in the cross-bills filed in the original action, are simply turning the other side of the shield to the front and bringing an action in the State of Nevada in an attempt to quiet their title to a water right they claim in the stream in the State of California because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondents, by virtue of their appropriation in Nevada, happen to have a right in this stream in the State of Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change its point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to its right to have the water flow down the stream in California, a right to have the water flow down the stream and be diverted in the State of Nevada, but by so doing, petitioner could not vest the Nevada court with jurisdiction over its right to

have the water flow down the stream in California. It is true that, after it changed its point of diversion down the stream into the State of Nevada, the Nevada court could protect its right to have the water flow down the stream in the State of Nevada, but the Nevada court would have no more jurisdiction to protect its right to have the water flow down the stream in the State of California after it changed its point of diversion into the State of Nevada, than when the point of diversion was in the State of California. The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream is exclusively within the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream is exclusively within the jurisdiction of the Nevada court.

Respondents' main argument in support of the jurisdiction of the United States Circuit Court for the State of Nevada was, that a stream is, by its very nature, an *indivisible res*. Being indivisible, if a part of it is within the jurisdiction of a court, the whole of it is within the jurisdiction of that court. Thus, as the lower portion of this stream flows through the jurisdiction of the United States Circuit Court for the district of Nevada, that court has jurisdiction to adjudicate the rights in the whole stream. Likewise,

it can be argued that, as a portion of the stream flowed through the State of California, the stream being an *indivisible res*, the courts of the State of California have jurisdiction to adjudicate rights in the entire stream. In other words, the argument is to the effect that this stream is a subject matter over which the courts of these respective States have each complete and concurrent jurisdiction. As before observed, this argument of the *indivisible res* would empower the California court to adjudicate as to the rights to have the water flow exclusively through and be diverted from the Nevada portion of the stream, and would empower the Nevada court to adjudicate the right to have the water flow exclusively through, and be diverted from the California portion of the stream. The fact that the water flows from the State of California into the State of Nevada could not render the jurisdiction of the California court over the Nevada portion of the stream any different from the jurisdiction of the Nevada court over rights in the California portion of the stream, if the stream is an *indivisible res*. If the stream is an *indivisible res*, it can not be divisible when you look down the stream, and indivisible when you look up the stream.

As above noted, there is no authority in law giving courts of different States concurrent jurisdiction over the same subject matter in a local action. There is nothing any more indivisible about a stream, then

there is about a piece of land, or a wagonroad or a railroad lying partially in two States. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagonroad or a railroad contemplate a movement in both directions along the way, but this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or vice versa, if an *indivisible res*, would be both wholly in the United States and wholly in British Columbia. But this question of the indivisible nature of a stream and the concurrent jurisdiction of courts of different States thereover, is not an open question. It came before this court in the case of the *Miss. & Mo. R. R. Co. vs. Ward*, 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River, and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi River, and thus one-half of the stream and one-half of the bridge only were within the

territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But the Supreme Court of the United States did not view either the bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream, and held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and thus determined that the court could neither inquire into, nor adjudicate, concerning rights in the stream or the effect of the bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

"This is a question that we can not examine nor reach by a decree, as the relief suggested is

clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi River by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an Act of Congress."

Again, Mr. Justice Nelson, while dissenting from the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

"The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any

local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a bridge, and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that, this action being one to abate a nuisance, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

The Court of Appeals speaking in the case of

Rickey Land & Cattle Co. vs. Miller & Lux, 152 Fed., 11, which opinion is referred to and made a part of the opinion in this case, lays stress on the fact that respondents' water right is *an easement* appurtenant to certain lands "REALTY" which lie in Nevada, and, speaking of the right or easement, says, "IT SAVORS OF, AND IS PART OF, THE REALTY ITSELF," and thus the suit is "*one concerning or pertaining to that realty*," from which the deduction is made that, the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception simply is that an easement must, of necessity, have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous, seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement to which they are appurtenant. As was said by way of illustration by Justice Woodbury in the leading case of *Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, p. 83, in speaking of a water right in an interstate stream:

"Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in

their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in another for the injury committed there."

See also,

Bannigan vs. City of Worcester, 30 Fed., 394.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court simply because it happened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell vs. Johnson, supra;

Morris vs. Bean, supra;

Hoag vs. Eaton, supra;

Anderson vs. Bassman, supra.

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which rights were appurtenant to lands in the lower State. If the water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject matter within the jurisdiction of the court.

But, even conceding this manifestly erroneous doc-

trine to be correct, conceding that respondents' land being located in Nevada has the effect of causing respondents' rights in this stream in California which are appurtenant to this land to be drawn down and located in Nevada, then there is nothing left within the jurisdiction of the California court to make a conflict. The California court simply has no jurisdiction over the subject matter, and its judgment would be a nullity and a vain act. Courts of equity will not interfere to restrain the doing of a vain act.

It is true that the subject matters of these actions in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California, but that dependency does not make them one and the same. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California may diminish respondents' right in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondents' rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondents' rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The

right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream as an easement right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondents' right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondents must have protection, irrespective of whether they desire to divert the water from the California or the Nevada portion of the stream. If respondents can protect their rights in the stream in California, then they may receive the amount of water they are entitled to and desire to divert in the State of Nevada at the State line dividing the two States. Respondents' right directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondents may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondents, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California, then, beyond question, their rights in the stream are in the State of California and beyond the jurisdiction of the

Nevada court. *Conant vs. Deep Creek Irrigation Co.*, *supra*.

Then let respondents change their point of diversion and use down the stream onto lands in the State of Nevada. By so doing, have they lost their rights in the stream in the State of California? Or have they not the very same rights in the stream in the State of California that they had before they changed their place of use? We respectfully submit they have. They have lost no rights in the stream in the State of California by changing their point of diversion and use to a point lower down on the stream and in the State of Nevada, and they can at any time change their point of diversion and use back up the stream and into the State of California.

Hargrave vs. Cook, 108 Cal., 80;

Kidd vs. Laird, 15 Cal., 180;

Davis vs. Gale, 32 Cal., 26.

By changing their point of diversion and use from the State of California to a place lower down on the stream and in the State of Nevada, respondents may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that they did not have when they diverted all the water they were entitled to in the State of California; but the acquisition of such new rights to have the water flow down the stream in the State of Nevada that would result

from the changing of their point of diversion and use from a place up the stream and in the State of California to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there just as much as they ever were, and any action having as its subject matter rights in the stream in California might affect these rights, but the rights affected would be just as much in the State of California in the case supposed after the point of diversion and place of use had been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into the courts of Nevada, which are the only courts having jurisdiction thereof.

Just as the courts of California can not protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of *Stillman vs. White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diver-

sion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

"Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses*, p. 11, Sec. 3, and cases there cited; *Webb vs. Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as

the affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259. The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Cook, 62.

"The chief error in the position of the respond-

ents is in supposing that the plaintiffs have no rights whatever beyond the center of the river, or no interests to be protected there.” (Italics ours.)

See also *Bannigan vs. City of Worcester*, 30 Fed., 394.

THIS COURT CAN NOT AFFIRM THE DECREE HEREIN, WHICH WAS AWARDED ON THE NECESSARY GROUND THAT THE SUBJECT MATTER OF THE ACTION COMMENCED BY PETITIONER IN THE STATE OF CALIFORNIA IS THE SAME AS THE SUBJECT MATTER OF THE ORIGINAL BILL FILED BY RESPONDENTS IN THE STATE OF NEVADA WITHOUT RULING DIRECTLY IN CONFLICT WITH THE DECISIONS ANNOUNCED IN THE ABOVE-CITED CASES OF

Howell vs. Johnson, 89 Fed., 559;
Morris vs. Bean, 123 Fed., 618;
Hoag vs. Eaton, 135 Fed., 411;
Anderson vs. Bassman, 140 Fed., 14-20.

These cases all hold that the right of respondents to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the sub-

ject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State, in the courts of the upper State. These actions were presented on bills of complaint of precisely the same nature as the original bill of complaint in the case of *Miller & Lux vs. T. B. Rickey et al.*, which the Court of Appeals, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But, we submit, that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by petitioner herein in Mono county, California, to quiet its title to the waters of the Walker river, in the State of California.

Supposing that respondents herein had gone into the United States Circuit Court for the Northern District of California and commenced an action against petitioner herein to enjoin petitioner from diverting the water of the Walker river, in the State of California, and set up their rights and appropriations in said Walker river, where would have been

the subject matter of that action? Clearly, it would have been exclusively in the State of California. Should respondents prevail, the said court of California would have jurisdiction to protect their rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect respondents' rights in the stream would stop at the State line. It could deliver the water at the State line but no further. Petitioner herein might, if such a decree was rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above respondent's point of use in the State of Nevada, and the decree in the court of the State of California could in no wise determine the rights in the stream in the State of Nevada or protect respondent's rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, respondents would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by petitioner in the State of California are in the State of California. If these same rights and this same subject matter are within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have

concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above-cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. These were the rights of respondent that were involved in the action commenced by petitioner in Mono county, California, and none of those rights are involved in the action pending in the State of Nevada. Thus, the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of

rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions, Miller & Lux would establish and protect its entire rights in the stream in California, as well as in Nevada, but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise, by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO THIS COURT MUST HOLD THAT THE SUBJECT MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against T. B. Rickey. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending. (Black on Jdmts., §550; Freeman

on Jdmts, §§ 196-7.) For the doctrine of *lis pendens* to apply, the *res* must be within the territorial jurisdiction of the court.

Carl vs. Lewis Coal Co., 96 Mo., 149;
Sheldon vs. Johnson, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate wholly in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the bill filed by respondent in that action, yet the *res* transferred was the subject matter of the action in the Mono county suits, and thus it follows that there is no room for the application of the doctrine of *lis pendens* by which it is sought to connect petitioner herein with the original action of *Miller & Lux vs. Rickey et al.* and the cross bills filed by respondents in that action.

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in

streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream, and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this branch of the argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co. vs. Miller & Lux*, 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water

flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal hereditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land (*Jacobs vs. Lorenze*, 96 Cal., 340). The easement in the water may be transferred from a present owner to another, and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court, therefore, made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the

stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux as well as the easement claimed by cross-complainants attached to the entire stream above the ditches of Miller & Lux and cross-complainants, respectively. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada petitioner disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to realty," and that the right to water was to be treated as real estate, and further that the court of Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono county case in California was unequivocally real estate in the State of California. The Court concluded that the Nevada court had no jurisdiction to quiet the title to this land. How, then, did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of the Court supporting the jurisdiction is as follows, see page 17:

"The appellant's counsel maintain that, because the appellant has set up in its answer and

cross bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of Cali-

fornia, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appro-

priators, though the latter withdrew the water within the limits of a different State. *Howell vs. Johnson*, 89 Fed., 556; *Hoge vs. Eaton*, 135 Fed., 411; *Anderson vs. Bassman*, 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson vs. Bassman*. 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson river, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.' "

As the whole decision rests upon this part of the opinion, we desire to follow this reasoning sentence by sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

"The appellant's counsel maintained that because the appellant has set up in its answer and cross-bill to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its

right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada."

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono county as standing in the same relation to the original case, as would such facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be practically to make it a plea to the jurisdiction, not of the cause of action in Nevada, but to the cause of action in the State of California. And if Miller & Lux had *expressly* stated a cause of action in the water in the State of California, such plea would have been sustained.

The next sentence is also predicated upon the same conception:

"Complainant must be permitted to proceed upon the case made by its pleadings and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant."

It is observed that the Court uses the words "can not defeat the jurisdiction." That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: "It may be said that the court "in Nevada has not the power to quiet the title of "the defendant in the State of California." With this statement there is no controversy, but we do further contend that the court of Nevada, has no power to quiet the title of the complainant, *Miller & Lux*, in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

"But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defendant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux*, and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of Miller & Lux in and to the water, and that the title of Miller & Lux is at all times the subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant
" has a right to set up its conflicting interests which
" are in California as a defense against the attempt
" of the complainant to have its title in Nevada
" quieted, because the complainant's title in Nevada
" must depend upon whether complainant has the
" better title as against defendant *in the State of California.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of California is only another way of determining what

is the title of Miller & Lux to the waters *in the State of California*. After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claim an easement in the stream from their ditch in Nevada to the source of the river. Rickey claims an easement in that part of the stream

only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the answer and the cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California." We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either*, in the State of California. The Court then proceeds: "Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, through the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and if not, then to settle and quiet complainant's title and rights thereto."

Where? The statement admits that the inquiry is as to the respective rights of the parties in the stream in California. It tacitly admits the interest of both parties in that State, and an inquiry into those rights.

Why, then, should the Court say that the inquiry is to determine Miller & Lux's rights in the State of Nevada, when directly the inquiry is in fact and substance to determine what are Miller & Lux's rights in the State of California. When the Court asserts that it can not adjudicate defendant's rights to the stream in California, it at the same time asserts that it can not adjudicate Miller & Lux's right to the stream in the same State. Yet an adjudication that defendant do not take water from the stream *in the State* of California, is an adjudication of the rights to water in that State in favor of the complainant. The Court changed its viewpoint of the case. Sometimes it held fast to the fact that the subject of the action was the *asserted title of Miller & Lux* in the State of Nevada. Then the viewpoint shifted and argued as though the inquiry in the State of California was not as to the title of Miller & Lux, but was as to the title of the defendant. And it said, the inquiry is to determine defendant's rights in the State of California, so as to determine complainant's rights in the State of Nevada. We submit that the determination of Miller & Lux's rights in the State of California would determine as exactly what Miller & Lux's rights in Nevada were, as would the indirect process of determining what were the defendant's rights in the State of California. One method is direct to the purpose; the other is indirect by process of elimination. But at all times and under all cir-

cumstances the inquiry must be, and is: the asserted rights of Miller & Lux to the water. It never changes to an inquiry into defendant's title or rights at any place.

To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals, on pages 19 and 20, is based upon an assumption of jurisdiction in the court and then further assuming a contention on the part of appellant that the answer of defendant attempts to limit or circumscribe the admitted jurisdiction, whereas the real contention is that the court has no jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise.

Let us assume for a moment that the court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the

State of California. Then, what becomes of the doctrine of lis pendens?

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quieted is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell vs. Johnson*, 89 Fed., 556; *Hoge vs. Eaton*, 135 Fed., 411, and *Anderson vs. Bassman*, 140 Fed., 14. As the action in each of those cases was commenced in the State which was uppermost on the stream, it would follow, under the announcement in this case, that the court did not have jurisdiction, because the location of the thing was not within the jurisdiction of the court. We believe those cases were correctly decided, and were so "decided" upon the contention advanced in this case, viz., that the easement of the lower owner on the stream extends throughout the length of the stream above his place of diversion.

The Court of Appeals failed to give recognition to the distinction that the appropriator in the lower State has an interest in the stream in the upper State, while the appropriators in the upper State have no rights whatever to the water in the lower State.

The last sentence quoted from the opinion seems to assume that the rights to the use of water are all acquired by appropriation in both States, and that the appropriator first in time is first in right. The

argument based upon such a conception entirely ignores the rights vested in riparian owners in the State of California.

In the State of Nevada the courts have refused to apply the doctrine of riparian rights to streams. In the State of California the riparian rights are fully recognized as they existed at common law with but one modification, namely, a reasonable use of the water among the several riparian owners for the purposes of irrigation.

Lux vs. Haggin, 69 Cal., 255.

In the State of California the riparian owners can use all the water among themselves, and an appropriator upon the stream never acquires any rights as against a riparian owner owning land on the stream above his point of diversion. If the Walker River was entirely in the State of California, then the title to the water would be owned by the riparian owners along its banks, and these riparian owners could use all of the water among themselves to the exclusion of all appropriators. As the stream is not entirely in the State of California, and as the State of Nevada recognizes no such thing as a riparian right, the question arises, who becomes entitled to the use of the water after it crosses the State line. That is to say, who has any rights in Nevada that a *riparian* owner in California, as such, must recognize.

If the riparian right of the State of California ex-

cluded the use for irrigation, then all the water of the stream would run into the State of Nevada. The State of California has modified the riparian right so as to permit the riparian owners to use a reasonable quantity for irrigation. To that extent they deprive the State of Nevada of the water so used. If the State of California can deprive the State of Nevada of a part of the water, it may, by its laws, deprive the State of Nevada of all of its water.

It has not yet been decided in the State of California whether an upper riparian appropriator can use all of the water of the stream as against the lower appropriator. If such should be declared to be the law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points the argument that the appropriator in the State of Nevada by being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux vs. Haggin, supra*), so that in inquiring into the rights of appellant in the State of California to the water, you are at the same time inquiring into that which is a

part and parcel of its land. As against such upper riparian owner taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in the stream according to the laws of the particular State in which the rights are asserted.

Barney vs. Keokuk, 94 U. S., 324;

Parker vs. Bird, 137 U. S., 661;

Hardin vs. Jordan, 140 U. S., 371.

Such court cannot administer a common law exclusively appropriation, or exclusively riparian, to conform to the laws of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation*, and to adjudge and command accordingly, ignores absolutely the riparian rights which are a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law

must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself.

There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and what is the thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the title of *Miller & Lux* in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what *Miller & Lux's* rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of *Miller & Lux* in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens*.

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is *Miller & Lux's* title in Nevada, then

to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of California*, then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants, in order to apply the doctrine of *lis pendens*, that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction, the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens*, the thing, subject of the suit, is in the State of California.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First, an action the subject matter of which is in the State of Nevada. Secondly, there is attempted to be presented, between Rickey and Miller & Lux, an issue as to water in the State of California, viz., Miller & Lux's right to water *in the State of California*, of which the Court has no jurisdiction.

The trouble arises in attempting to apply the rule of *lis pendens* in a case where jurisdiction of a subject matter does not exist.

If the court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of California, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals, which deal with abstraction so far as the conclusions of that court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

II.

ASSUMING THAT THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA, IN A LOCAL ACTION OVER WATER RIGHTS, HAS JURISDICTION OF RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, THE SECOND QUESTION IS AS TO THE JURISDICTION OF THE SAID COURT OVER A CONTROVERSY BETWEEN CO-DEFENDANTS IN SAID ORIGINAL ACTION, ALL CITIZENS OF THE SAME STATE, INITIATED BY ONE CO-DEFENDANT FILING A CROSS-BILL TO ENJOIN ANOTHER CO-DEFENDANT FROM TRESPASSING ON RIGHTS IN THE STREAM IN CALIFORNIA, CLAIMED TO BE OWNED BY THE FORMER CO-DEFENDANT AND CROSS-COMPLAINANT.

There are three fundamental and settled propositions of law governing the rights to file cross-bills in an equity proceeding.

FIRST, *no new subject matter can be introduced by a cross-bill, but the subject matter of the original bill and of the cross-bill must be identical.*

SECOND, *a cross-bill cannot interpose new controversies between co-defendants in the original bill,*

but the controversy and the action set out in the cross-bill must be the same as that in the original bill.

THIRD, *the subject matter of the cross-bill must be matter that it is necessary for the cross-complainant to establish as a defense against the action instituted by the original bill.*

Rubber Co. vs. Goodyear, 9 Wallace, 807, at page 809, it is said:

“A cross-bill is brought to obtain a discovery of facts in aid of the defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit and a graft and dependency upon it. If its purpose be different from this it is not a cross-bill, although it may have a connection with the same general subject.”

Stonemetz vs. Brown Co., 46 Fed., 851, it is said:

“A cross-bill *ex terminorum* implies a bill brought by defendant against plaintiff in the same suit, or against both, touching the matter in question in the original bill. (*Story's Equity Pleading*, Sec. 389.) It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matter charged in the original bill.

“It should not introduce new and distinct matters not embraced in the original bill, as they

cannot be properly examined in that suit, but constitute the subject matter of an original independent suit. The cross-bill is auxiliary to the proceedings in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross-bill constitute but one suit, so intimately are they connected together. (*Ayers vs. Carver*, 17 Howard, 591; *Cross vs. De Valle*, 1 Wall., 5.) It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject. (*Rubber Co. vs. Goodyear*, 9 Wall., 807.) In the last cited case the bill was filed for infringement of a patent. The defenses were invalidity of the patent and a license. By the cross-bill the defendant sought to set off a judgment against plaintiff against the damages he might recover in the infringement suit. The Court held the cross-bill improperly filed. A cross-bill must grow out of the matters alleged in the original bill and is used to bring the whole dispute before the Court so that there may be a complete decree touching the subject matter of the action. (*Ex parte Railroad Co.*, 95 U. S., 221.) A cross-bill must be confined to the subject matter of the original bill, and cannot introduce new matters not embraced in the original bill. If it does so, the cross-bill becomes itself an original bill, and there cannot be two original bills in the same cause. (*Dotz vs. Phillips*, 24 Wkly. Notes, Cas., 382.) A cross-bill is like an

original bill, except that it must rest on what is necessary to the defense of an original bill, (*Brandin Manufg. Co. vs. Prime*, 14 Blatchf., 371.)

"In the case of *Johnson R. S. Co. vs. Union S. & S. Co.*, 43 Fed., 331, permission was refused to file a cross-bill in an infringement suit, wherein the defendant set up the claim of right to a trademark or name, for an electrical system, which included the use of a patentee's name as going beyond the case of the plaintiff in the original bill, not necessary as a defense to that bill, and matter entirely foreign to the primary controversy. In *Young vs. Colt*, 2 Blatchf., 373, the Court says: A cross-bill, as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill in respect to their mutual title or interest in the subject matter of the suit.

"Where a cross-bill to a bill of foreclosure brought by a party representing the British Government set up an independent claim of the respondents against the British Government, it was held, in *Rowan vs. Manufacturing Co.*, 33 Conn., 1, to be matter which, upon general principles, could not be set up by a cross-bill, the Court saying:

"If it is true that the matter set up in this cross-bill is wholly independent of the matter set up in the bill, and does not touch or relate to that matter, either for the purpose of defense to it, or for any disclosure relating to it, but is merely set up for the purpose of laying the foundation for some independent relief, it seems quite obvious,

upon authority and principle, that for the purpose of any such independent relief as is asked for, the cross-bill should be dismissed.

"In *Dotz vs. Phillips, supra*, a bill was filed for the specific performance of one agreement, and the cross-bill alleged violation of another independent agreement, and prayed relief against the plaintiffs. The Court held that the cross-bill was improperly filed, saying: The plaintiffs seek a specified performance, and that only. It is no answer to that to say that the plaintiffs have broken another agreement relating to another subject. In *Galatin vs. Erwin Hopk.*, Ch., 48, the original suit was for foreclosing two mortgages. By cross-bill one of the defendants in her defense sought to impeach for fraud the title of the mortgagor, not only to the mortgaged premises, but to other lands."

See, also:

Stewart vs. Hayden, 72 Fed., 402, particularly page 410;

Cross vs. De Valle, 1 Wallace, 1, particularly page 14;

Johnson Railroad Co. vs. Union Switch Co., 43 Fed., 331;

Chattanooga Co. vs. Thedford et al., 58 Fed., 347, particularly see page 352;

Eyre vs. Carver, 17 Howard, 591, particularly page 595;

- Fidelity Trust Co. vs. Mobile Street Co.*, 53 Fed., 850;
Thurston vs. Big Stone Gap Improvement Co., 86 Fed., 484;
Dickerman vs. Northern Trust Co., 80 Fed., 457;
Bunel vs. O'Day, 125 Fed., 303;
Elliott vs. Pell, 1 Ch., 263-268;
Gallatin vs. Erwin, 1 Hopkins, Ch., 48;
Hogg vs. Hogg, 107 Fed., 814;
Johnson vs. Union Co., 43 Fed., 331;
Van Zant Equity Practice, 223;
Story's Equity Pleading and Practice, Sec. 399;
Daniels' Ch. Practice, 4 Ed., Sec. 1549;
Vanerson vs. Leavitt, 31 Fed., 376.

The Court of Appeals, in its opinion, grants the proposition that the cross-bill must present matters for a consideration of the Court, which are defensive to the original action.

In its opinion filed herein, in the case of *Miller & Lux vs. Thomas B. Rickey and others*, No. 1365, that Court has defined clearly what it considers to be, first, the nature of the action, to wit: an action to quiet title, and, second, the subject matter of that action, to wit: an easement appurtenant to certain land of appellant.

Having determined these two facts, it is not difficult to determine whether the cross-bills filed were

defensive to the original action. The cross-bills *admitted* the cause of action stated in the original complaint, and then set up a cause of action between defendants, both of whom resided in the State of Nevada, wherein the cross-complainants sought to litigate a cause of action of the same nature as the original action *about another subject matter*, to wit: an easement claimed by cross-complainants to be appurtenant to the lands owned by cross-complainant.

Let us closely examine the cause of action stated in the complaint, and the cause of action stated in the cross-complaint, and see whether the establishing of the cause of action stated in the cross-complaint will in any manner be defensive to the original action. Let us view both through the decision of the Court of Appeals to find the nature of the cause of action and the subject matter of the cause of action. The Court declares the original cause of action in the suit of Miller & Lux against Thomas B. Rickey to be an action to quiet title. For the purposes of logically determining the relation of the cross-bill to the original bill, that conception of the nature of the action must continue. Again, the Court, in the case of *Miller & Lux vs. Thomas B. Rickey and others*, decided that the subject matter of the action to quiet title, was the right of Miller & Lux to have a definite quantity of water flow down the Walker river to the place of diversion of Miller & Lux, which it deter-

mined was an easement appurtenant to the lands in the complaint described.

The cross-complainants admit this right of complainant, and commenced an action of the same nature as the original bill (because the cause of action in their cross-complaint is stated identically as is the original cause of action). The subject matter of the actions in the cross-bills is a definite quantity of water in the Walker river, which is claimed to be appurtenant to other lands than those described in the original complaint.

The right to the water (the easement in the stream), which is appurtenant to the lands of Miller & Lux and is the subject of the original bill, is not the same right (the easement) to water which is appurtenant to other lands owned by the cross-complainant. It would seem, therefore, that the subject matter of the two actions not being the same, that the cross-bill is improper, and it must be borne in mind that in the case of *Ames Realty Co. vs. Big Indian Mining Co.*, 146 Fed., 166, the cross-complainant asserted rights against the complainant in that action, a fact which does not exist in this case. In other words, in the case last mentioned, a defense was asserted against the complainant, while, in this case, no defense whatever is asserted against complainant.

It is difficult to conceive how a cross-bill can be defensive, which admits the cause of action stated in the original bill, as is the case here. It is defensive

only in the same sense that when a debtor is pursued by his creditor, the same debtor must become a creditor as to his own debtors and enforce the obligations owing to him in order that he can better pay any judgment rendered against him in favor of his own creditor, and thereby avoid the injurious consequences which follow the enforcement of a judgment when he is without funds to meet it.

Let us illustrate by a right of way pertaining to several tracts of land owned by A. B. and C. If A commences an action to quiet his title against B and C, it would not be defensive for B, as against A's claim to the easement, to seek to quiet his title against C.

But let us take an illustration more closely resembling the consequences the Court seeks to avoid by permitting this cross-bill, and suppose that there are three rights of way on adjacent strips of land, one appurtenant to the land of A, the other appurtenant to the land of B, and the third appurtenant to the land of C; each is 12 feet wide, and that 12 feet in width is absolutely necessary for use of the way. A dispute arises between these three people regarding the exact location of these several rights of way, and A insists that B's claim of right of way encroaches upon him 6 feet, and A brings an action against B and C. Now, manifestly, if B owns the right of way over the middle strip, and he is compelled to move back 6 feet, he will be curtailed in the width

of his right of way by the claim of C on the other side unless C also moves back. This is only a consequence, however, of A asserting his rights against B. That such consequences may follow, is not in any sense defensive to the original claim between A and B. It would seem that the conditions, to avoid which the cross-bills in this case are tolerated, are very much akin to this illustration, and in the case taken for illustration we do not think the Court

Whatever consequences may flow from a judgment would tolerate a cross-complaint between B and C, or decree predicated upon a cause of action, that only is defensive which defeats the cause of action. Those wherein B admitted the claim of A.

conditions which exist, or might exist, in case the relief asked for is granted and which may make the observance of the decree onerous are no part of the cause of action. Any proceeding intended to modify the hardships of such a condition is not defensive to the cause of *action* upon which the judgment may be predicated.

Facts are sometimes alleged in defense which are proper for the consideration of a court of equity in qualifying its decree against the defendant. Is the Court prepared to say that the judgment and decree to be rendered in this case against the defendants will so marshal their rights in favor of the plaintiff, or that the decree can be qualified, so that the cross-complaint will not be in disobedience of its com-

mands, as between cross-complainant and complainants, so long as some person holding subordinate is using no more than his share? Unless yes, the Court is powerless to avoid the consequences which the Appellate Court seems to hold sufficient to justify the cross-bill as defensive. Cross-complainants admit Miller & Lux's priority of right to the water, and the judgment must be in favor of Miller & Lux on that priority. The cross-complainant would be in contempt of court if using any water while Miller & Lux was not receiving its full allotment, and that, too, regardless of what trespasses were made by other persons on the stream, unless the Court concedes that a judgment can be framed under the issues made in the cross-complaint against Rickey, whereby the cross-complainant would be exonerated from the effect and commands of the judgment is using only the quantity of water which cross-complainant was entitled to, when other persons were using more than the quantity to which they were entitled. The relative rights of the defendants among themselves is absolutely immaterial as a defense against the original bill; that is to say, it must be defensive as a protection against contempt proceedings, or it must be defensive against the cause of action itself. If, under no circumstances, could the cross-complainant answer a contempt proceeding by saying that the cross-complainant was using no more than the share of water to which he was entitled, and that the cause of

the shortage of complainant's water was the trespass of Rickey upon the stream above, then this cross-bill can not be defensive as giving facts to qualify the terms to the decree, and certainly it can not be defensive in any way to the original cause of action set up in the bill which it expressly admits.

III.

THIRD, ASSUMING THAT THE SAID UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA, IN SUCH A LOCAL ACTION, HAS JURISDICTION OVER WATER RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, AND ASSUMING THAT THE SAID UNITED STATES CIRCUIT COURT HAS JURISDICTION OVER A CONTROVERSY INITIATED BY ONE CO-DEFENDANT FILING A CROSS-BILL TO ENJOIN ANOTHER CO-DEFENDANT FROM TRESPASSING ON RIGHTS, CLAIMED BY SAID FORMER CO-DEFENDANT AND CROSS-COMPLAINANT IN THE STREAM, YET, IF, PRIOR TO THE FILING OF SUCH CROSS-BILL, SAID CROSS-DEFENDANT SHALL HAVE COMMENCED AN ORIGINAL ACTION IN THE STATE COURT OF THE STATE OF CALIFORNIA TO QUIET HIS TITLE TO RIGHTS IN THE STREAM IN THE STATE OF CALIFORNIA AGAINST CROSS-COMPLAINANT, IS NOT THE JURISDICTION ACQUIRED BY THE COURT OF THE STATE OF CALIFORNIA IN THE ACTION SO COMMENCED, SUPERIOR AND EXCLUSIVE OVER THE SUBJECT MATTER AND CONTROVERSIES BETWEEN THE PARTIES TO THAT

ACTION, TO ANY WHICH WAS AFTERWARD SOUGHT TO BE VESTED IN THE FEDERAL COURT FOR THE DISTRICT OF NEVADA BY FILING THE CROSS-BILLS THEREIN?

The suits commenced by petitioner in Mono county, California, were filed on the 15th day of October, 1904 (Trans., p. 8).

The cross-bills of respondents were filed over two months later, to wit: on the 20th day of December, 1904 (Trans., p. 14).

The actions commenced by petitioner in the Superior Court of Mono county, being actions to quiet and establish title to real property, were in the nature of actions *in rem*. They were actions wherein summons could be served by publication.

Arndt vs. Griggs, 134 U. S., 316.

In actions *in rem* the jurisdiction of the Court attaches, not at the time of the service of process, but at the time of the filing of the bill.

Rogers vs. Pitt, 96 Fed., 668;

Farmers' Loan and Trust Co. vs. Lake Street Elevated R. R. Co., 177 U. S., 81.

From these authorities it appears that, assuming a conflict to exist between the State Court of California and the Federal Court sitting in Nevada, yet, as between petitioner and respondents herein, petitioner having filed his complaint in the California court

more than two months prior to the filing of the cross-bills by respondents in the Federal Court of Nevada, the California Court first acquired jurisdiction and, under all the authorities, the Court first acquiring jurisdiction over a controversy, should be permitted to continue undisturbed to the termination of the case.

Therefore, we respectfully submit:

FIRST, that the actions commenced by petitioner in California did not, and could not, present the same issues as were presented by the cross-bills filed by respondents in Nevada, for the reason that the Court sitting in Nevada has no jurisdiction to try any issues presented in the California actions.

SECOND, assuming that the United States Circuit Court for the District of Nevada, in a local action over water rights, has jurisdiction of rights in the California portion of the stream, yet said Court has no jurisdiction over a controversy between co-defendants in said original action, all citizens of the same State, initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights in the stream in California, claimed to be owned by the former co-defendant and cross-complainant.

THIRD, assuming that the said United States Court for the District of Nevada, in such a local action, has jurisdiction over water rights in the California

portion of the stream, and assuming that the said United States Circuit Court for the District of Nevada has jurisdiction over a controversy initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights claimed by said former co-defendant in the stream, yet, we respectfully submit, if, prior to the filing of such cross-bill, the said cross-defendant having commenced an original action in the State Court of the State of California to quiet his title to rights in the stream in the State of California against cross-complainant, the jurisdiction acquired by the Court of the State of California is superior and exclusive over the subject matter and controversies between the parties to that action, to any which was afterward sought to be vested in the Federal Court for the District of Nevada by filing the cross-bills therein.

Wherefore, the Court below erred in making the decree herein.

Respectfully submitted.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

F. D. MCKENNEY.

Chief Justice, U. S.
FILED.

JAN 18 1910

JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~11~~ 5

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

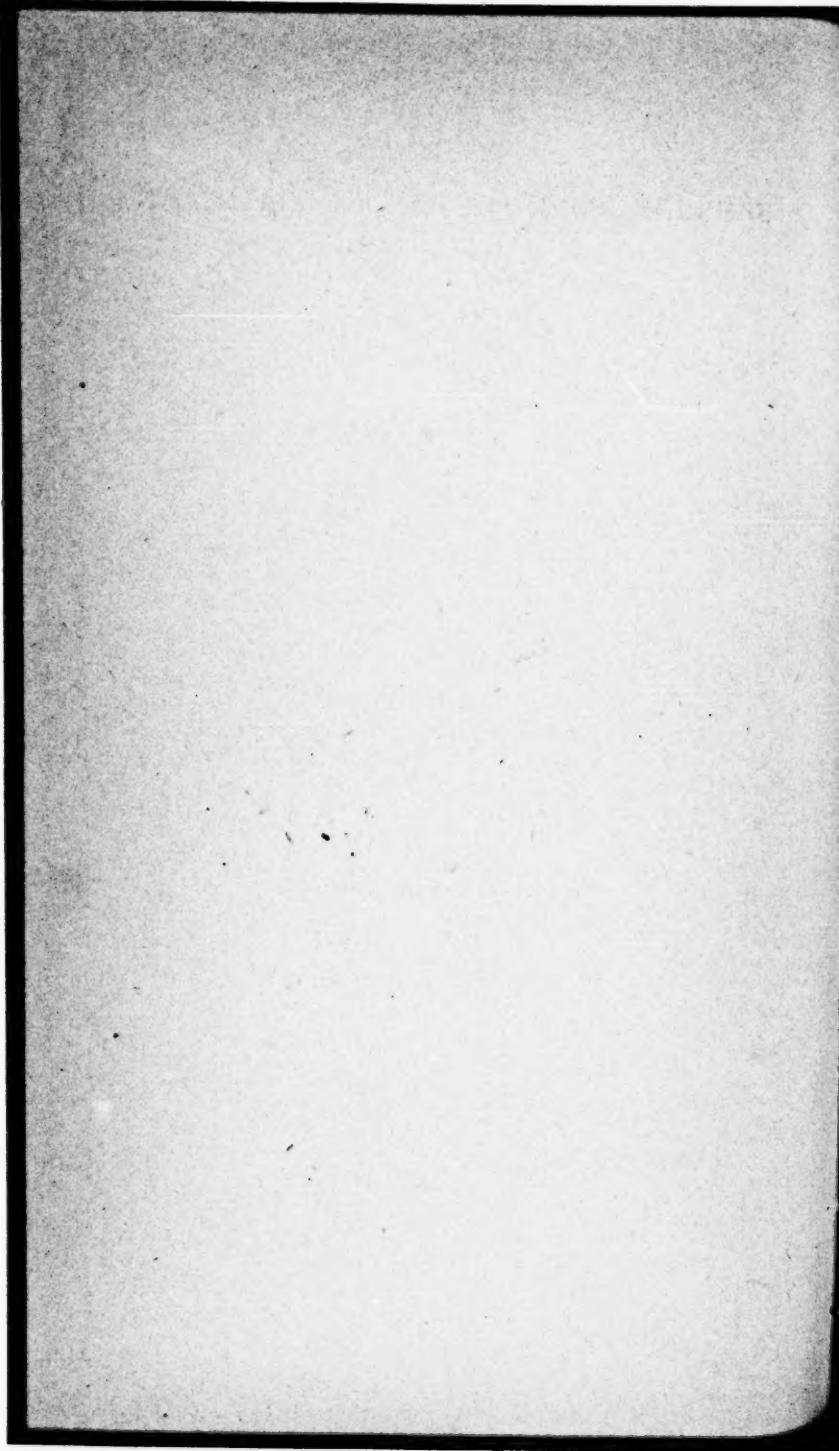
vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

A comprehensive brief was filed with the petition herein. It would serve no purpose to repeat that argument here. The brief filed with the petition and the brief filed upon the merits in Rickey Land and Cattle Co. *vs.* Miller & Lux, No. 89, argued and submitted with this case, are referred to.

This appeal involves the right of the respondents to file cost bills in the original action of Miller & Lux *vs.* Rickey and of the jurisdiction of the Circuit Court of Nevada to try the rights of the defendant, T. B. Rickey, in California, as between him and the cross-complainants. This question of jurisdiction is the same in some of its aspects as when the jurisdiction was considered between the original complainants, Miller & Lux, and the defendant Rickey. The argument there made is thus in a measure applicable here,

and but a few words will be added to what is offered in the petitioner's brief therein, No. 89.

The rule invoked by respondent is, "*Where a State court and a court of the United States may each take jurisdiction of the matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the others until the duty is fully performed, and the jurisdiction involved is exhausted.*"

Harkrader *vs.* Wadley, 172 U. S., 164.

Freeman *vs.* Howe, 24 How., 450.

Buck *vs.* Coldbath, 3 Wall., 334.

Taylor *vs.* Taintor, 16 Wall., 366.

Ex parte Crouch, 112 U. S., 178.

This rule only applies where the two courts, Federal and State, have *concurrent jurisdiction*. All the cases cited by counsel are of that nature. The rule as stated, by its terms, is so limited. The question here then is, Have the two courts, State court in Mono county, California, and the Circuit Court of Nevada, *concurrent jurisdiction* of any part of the Walker River?

The Federal court will not enjoin the prosecution of an action in a State court upon a cause of action wherein the Federal court has no jurisdiction. As the Circuit Court of Nevada has no jurisdiction to quiet or determine the title of Miller & Lux or of the defendant Rickey in that part of the stream which is in California, there can be no concurrent jurisdiction. When each of two courts have exclusive jurisdiction, the very nature of such jurisdiction prevents either court from interfering with or impairing the jurisdiction of the other.

Merritt *vs.* American Co., 79 Fed., 228, 232.

Baltimore R. R. Co. *vs.* Wabash R. R. Co., 119 Fed., 678.

The bill of complaint alleged that the defendant Rickey diverted the water "*under a claim of right*" (Transcript, page 3), and the cross-complaints also allege the same fact

(page 7, Transcript). Both the original bill and the cross-complaint allege that the water diverted by defendant Rickey under said claim was without right (Transcript, pages 3 and 7). Here were allegations in the original bill which had to be decided before any injunction could issue. In the complaint the locus of this claim of right and of the diversion by defendant Rickey was not alleged. It was therefore necessary to allege it in the plea to the jurisdiction of the court. All defendant Rickey's rights and claims of right were alleged in his plea to be in the part of the stream in the State of California. If these facts had appeared on the face of the bill, it would have defeated the court's jurisdiction at once without a plea. These facts were not offered to "justify" the trespass, as counsel says at page 11 of their brief in case No. 89, but to show that the Nevada court had no right to hear or to adjudicate upon the question of defendant Rickey's rights at all. The allegation of the fact that defendant's trespass was under "claim of right" was necessary to state facts entitling complainant to an injunction. Without this allegation nothing more than a mere trespass would have existed, and that would not authorize an injunction to issue.

Between Miller & Lux and defendant Rickey, under the allegations of the original bill, and between each cross-complainant and Rickey, under the allegations of the cross-complaints, there had to be tried and determined by the Circuit Court this "claim of right" of defendant Rickey to the waters of Walker river. Before the injunction could be decreed, therefore, the claim of right of defendant Rickey to water flowing in California must be determined. This is true, although no express adjudication may be made, and though the court proceed directly to decree the injunction.

The injunction, if decreed, would limit the use of the water of defendant Rickey in the State of California. This is accented by the respondent's claim that the decree would so impress the real property, water of defendant Rickey as to

bind his successors in estate, as privies, under the rule of *lis pendens*. The decree sought is not, therefore, one purely *in personam*. The respondents would not contend that the decree will be *in personam* against the defendants whose claims are to the water in the State of Nevada. As to such defendants, the respondents cite the case of Ahlers *vs.* Thomas, 24 Nev., 407, as to the effect of the decree. There it was held to impress the title to the defendant's real property, so as to create a privity binding the successor in estate. The decree sought against all the defendants, including the defendant Rickey, is the same, and is based upon the same allegations of facts. Suggesting this last point in another way, suppose the defendant Rickey had claimed rights in the water in Nevada and also in California. What, then, would have been the effect of the decree of injunction? It would certainly have impressed itself upon the title to the rights of defendant Rickey in Nevada. It would not have done so in California, because the real property there involved was not within the jurisdiction of the court. Yet the decree would not have been at the same time against the defendant Rickey *in personam* as to his rights in California and *in rem* as to his rights in Nevada.

At page 20 of respondent's brief, in case No. 89, is cited the case of Taylor *vs.* Hulett, 97 Pacific, 37, to the effect that the court of the lower State on a stream can quiet the title to the owner of water in an upper State, and that, too, where the defendant owning water in the upper State is not a citizen of the lower State wherein is held the court. This decision is rested upon the authority of the case now under review, and without any independent reasoning. Logically, the Court of Appeals decision in this case lends much support to the conclusion in the Idaho case. The Idaho case is, however, not in harmony with the great current of authority, and does not seem to meet with the approval of counsel (see top of page 23 of counsel's brief in No. 89). In this Idaho case, it is asserted that the decree in the court of a

lower State can be made effective against the title in the upper State by the force of the full faith and credit clause of the Federal Constitution. In this manner the policies of the lower State may be forced upon the upper State. In the case of *Kansas vs. Colorado*, 206 U. S., 95, this court said: "Neither State can legislate for or impose its own policy upon the other." If it cannot be done by legislative enactment, nor by constitutional provision, it cannot be done by a court, the creature of either. The State's integrity cannot be destroyed by judicial decree of foreign jurisdictions, affecting the titles to its realty. While, therefore, support may be found for the Idaho case in a decision of the Court of Appeals in this case, we insist that both decisions are wrong.

If both actions, the one in the Federal court and the two in the State court, should go to judgment *pro confesso*, there would be a decree in the Nevada court either *in personam*, or quieting title to the part of the stream in Nevada, and a decree in the State of California quieting title to the part of the stream in California. There would be no concurrent jurisdiction and no impairing of jurisdiction, or interference with process. It would only be when the decree in Nevada was asserted as affecting the title in California that the two decrees would cover the same ground. If, as counsel claim, such a decree in Nevada would act *in personam*, or, as we claim, would quiet title in Nevada, there would be no conflict of jurisdiction.

Counsel has cited many cases where damages were sought to be recovered for injuries inflicted where the act of trespass was in another county or State. In none of these cases would the decree when rendered affect the title of defendant to real estate, or the use of real estate, in another State except the cases of *Wiley vs. Decker*, 73 Pacific 210, and *Taylor vs. Hulett*, 97 Pacific, 37. In the suits for damages cited, either the place where the wrongful act *was committed* or the place where its consequences resulted in damages is held to be venue. In the case of an injunction to protect property from

a threatened trespass the two elements do not exist. The resulting damage has not occurred, and therefore has no locus. The property threatened with invasion is the only one of these two things to locate the venue where a preventative injunction is sought. Such a suit looks entirely to the future, not to the past. The water may today be used on one piece of land, tomorrow on another, and the third day it may be used for power or sold for municipal uses, and the water right in the stream be protected at all times against invasion by diversion. The water right inheres in the stream and the locus of the stream determines the venue of any proceeding which will affect the title to its waters. And the particular State where the right to invade it is claimed determines the forum of the trial of that right. This forum is exclusive, not concurrent, as to the determination of that right.

Stillman *vs.* White Rock Mfg. Co., 3 Wood and M., 538.

Gould on Waters, 3d ed., sec. 446.

Encyclopedia of Pleading and Practice, p. 1106, vol. 14.

Section 738, Revised Statutes, determines the place of trial of local actions in Federal courts.

Texas Pacific Railroad Co. *vs.* Gay, 86 Texas, 571.

U. S. *vs.* Winan, 73 Fed., 72.

Grove *vs.* Grove, 93 Fed., 865.

We have already commented upon the case of Taylor *vs.* Hulett. In the case of Wiley *vs.* Decker the plaintiffs diverted the water from the river in the State of Wyoming. Some of the plaintiffs used water from a ditch, into which they diverted the water in the State of Wyoming; others of the plaintiffs carried the water in the same ditch into the State of Montana, and there used the water. The defendants diverted the water in the State of Montana, and conducted

the water into the State of Wyoming, where they used it to irrigate land in the State of Wyoming. So far as any question is now before this court, these are the only facts material. The water flowed from the State of Montana into the State of Wyoming in a natural stream. The suit, therefore, was brought in the lower of the two States, and the injunction was sought to prevent water being diverted in the State of Montana, which water, however, was used by the defendants in the State of Wyoming.

This use of the water in the same State where the court held jurisdiction is one of the limitations expressly put upon the rule announced in the case.

Speaking of the facts, the court said, at page 213 of the report of the case in volume 73 of the Pacific Reporter:

"It is greatly to be regretted that in the determination of a question of such manifest gravity, the court has not been favored with a brief or argument on behalf of defendants."

That the fact that the water was used in the State of Wyoming by the defendant was important in consideration of the question is disclosed by the frequent allusions to it.

At page 212, at the top of the second column, the court says:

"It is agreed, however, that they (defendants) own lands in the county, and that their diversion of the water is for the purpose of irrigating those lands."

In a statement in the same column, on page 212, of questions submitted to the court, where the defendant's rights are again alluded to, it is stated:

"Has the District Court of Sheridan County, Wyoming, any jurisdiction under the facts stated, to prevent the diversion of water from said creek in Montana, and to prevent its being conveyed by private ditch from said State of Montana into the said State of Wyoming, and its use in said last-named State on lands of the defendants?"

So far as the discussion in *Wiley vs. Decker* applies to anything in this case, it commences at the bottom of first column of page 223. The jurisdiction of the court in that case to prevent the defendant from diverting water in Montana is placed upon the fact that injury occurs to the lands of the plaintiff in the State of Wyoming, and this, too, although the action is not one for damages, but for an injunction. We contend that the location of the injury in that case, so far as the action for an injunction is concerned, as well as the trespass itself, was in the State of Montana. The court, at column 1, page 224, say:

"The diversion made by the other defendants occurs in Montana and, although they conduct the water so diverted to and upon lands within this State, the act of diversion occasions the injury complained of, and the wrongful act therefore, if any, occurs in Montana, while it is equally obvious that the locus of the injury to plaintiffs Boyle, Foss and Verley is in this State where their ditch and land are situated."

Both of these statements by that court—one obvious, the other, as we contend, entirely wrong—is necessary to the decision in the case. We do not think it can be maintained that "it is equally obvious that the locus of the injury of plaintiffs Boyle, Foss and Verley is in this State (Wyoming), where their ditch and lands are situated." It is true there is a consequential injury which results there, but the injury and wrong which it is sought to enjoin is the injury and wrong where the trespass is committed on the plaintiff's rights. The plaintiff's rights existed in the stream in Montana, provided the laws of Montana recognize such rights, as they did in that case. Having rights there, they were trespassed upon at that place.

The court, at column 2, page 226, said: "If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting the title to the lands of plaintiffs in another State, it is quite obvious that it would be beyond

the jurisdiction of the court." If in the case of *Wiley vs. Decker* the court had no jurisdiction to determine the title in Montana, then the jurisdiction which it did assert must have been personal, and rested entirely upon the fact that the defendant had been served with summons and appeared.

At the bottom of column on page 224, in the case of *Wiley vs. Decker*, there is a quotation from Judge Holmes in the case of *Manville Co. vs. Worcester*, 138 Mass. The quotation is only partial, however, and Judge Holmes, as will be seen by reference to the decision itself, was speaking of an action for damages. He was not considering an action for an injunction, or to determine title in a foreign State further than such inquiry might be incidental to the question of damage. The full quotation (*italics ours*) is:

"If the plaintiff's mill were in another county of this State, an *action for damages* would rightly be brought in Worcester, not alone by the public statutes, but by common law. * * * As between two States, both of which recognize the right, if the rule is to vary at all, it should be on the side of greater liberality, to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained."

This rule of necessity announced by Judge Holmes cannot be involved in this case, because the courts of California were accessible to accomplish, as between Rickey and complainant, all the purposes sought to be accomplished in the suit brought in Nevada.

The case of the California Developing Company *vs.* The New Liverpool Salt Company, 172 Fed., 792, was a case where the defendant brought water into the State of California and there permitted it to flood the lands of plaintiff. The court did not undertake to determine the defendant's right to the water. That was conceded. The use in the State of California to the injury of complainant was prohibited. The rule there would have been the same had the defendant brought the water in a cup from a well.

All conflicts in jurisdiction referred to on pages 22 and 23 of respondent's brief in No. 89 disappear when the jurisdiction is properly limited.

We again assert that there was no concurrent jurisdiction in the two courts, and therefore the Circuit Court should not have enjoined the petitioner from prosecuting the actions in Mono County, Cal.

Sec. 720, Revised Statutes.

Jurisdiction in Circuit Court of Nevada to Entertain the Cross-Bills to Determine the Rights Between the Defendant Rickey and the Other Defendants, Cross-Complainants.

These cross-complainants were residents of the State of Nevada and so was the defendant T. B. Rickey. The rights sought to be determined between the cross-complainants and the defendant, T. B. Rickey, were like the rights sought to be determined between the complainant, Miller & Lux, and the defendant T. B. Rickey. To sustain the jurisdiction of the court as between the complainant, Miller & Lux, and the defendant Rickey there was the fact of citizenship in different States. This fact did not exist to support the jurisdiction of the court in determining the controversies made by the cross-complaints. The only jurisdiction claimed was ancillary to the controversy made by the original complaint.

Ancillary jurisdiction is an incident to the jurisdiction of the controversy made by the complainant. It grows out of necessity, in order that the court may do complete justice, *as to that controversy*, between the parties to the suit. It is not a rule of convenience. We have discussed this question at length at pages 68 to 80 in the brief filed in support of the petition for certiorari. To what is there said, I wish to review the case of Ames Realty Co. *vs.* Big Indian Mfg. Co., 146 Fed., 166, relied upon by respondent.

If, as respondent contends, the properties, subject to the action in the Circuit Court of Nevada, is the land of complainant and the water appurtenant to it in Nevada, and the jurisdiction of that court is personal over T. B. Rickey and the other defendants, to prevent each of them from committing a several trespass, then it would be difficult to see how a defendant could by a cross-complaint against his co-defendant assert anything defensive. His and his co-defendant's trespasses, under that assumption, would be separate, and none of them assert any interest in the land of complainant or its appurtenances the subject of the action.

The right to a cross-complaint in aid of a defense only arises when we reject the respondent's claim of jurisdiction *in personam*, and treat the action as one directly affecting land within the court's jurisdiction. Such was the facts and the nature of the case in Ames Realty Co. *vs.* Big Indian Mfg. Co. In that case the court had jurisdiction of the rights to the stream of all the defendants between whom it undertook to decree the title to the water or its use. Such is not the case here, however, as to the defendant Rickey.

The mere fact that the cross-bill pertained to certain part of the water in the Walker River, and the original bill also pertains to another part of the water of Walker River, does not, as we understand it, make the cross-bills ancillary to the main action. More than this must appear. There must be a relation between the cross-bills and the original bill which pertains to the controversy made about the water in the original bill, or pertains to some defense that the cross-complainants make to the controversy made by the original bill.

An entirely independent and different controversy between two defendants, although the thing about which the controversy as had is the same, does not determine that a cross-bill is ancillary. The cross-bill therefore must relate to the defense that the cross-complainants make against the original controversy. For instance: In this case, if the cross-

complainants admit the right of Miller & Lux as set out in the original bill (and there is nothing in their complaint herein to show that they did not, an absence which we contend is fatal to their showing; *Stewart vs. Hayden*, 72 Fed., 402), then there would be no defense to the original controversy to which a cross-bill could be ancillary.

Stewart vs. Hayden, 72 Fed., 402.

We assert, therefore, that the cross-bill in the Federal Court to be ancillary and to be permitted, *where the parties to the cross-bill are citizens of the same State*, must be in aid of the defense made by the cross-complainants to the original controversy.

If this were not the rule, the rights of citizens of the same State to have their rights, as between themselves, determined by the State jurisdiction, could be entirely defeated by procuring a suit to be brought in the United States courts wherein they could be made defendants, and the court under such an interpretation of ancillary jurisdiction, would proceed to hear and determine their rights.

It was held in *Stewart vs. Hayden*, 72 Fed., 402, that when the defendant seeking to file the cross-bill confesses the cause of action in the original bill, that he has no ground to file the cross-bill, the court there saying:

"Tested by these rules the pleading filed by Grutter & Goers was not a cross-bill. It was not brought in aid of their defense to the original suit, for they had none."

This is but another way of saying that the cross-bill must be in aid of a defense. I think these authorities conclusively establish that a cross-bill must be in aid of the defense, or there must be a necessity for it in order that there may be a full and complete adjudication of *the controversy*. That is, the controversy made by the original bill.

If a full and complete determination of the controversy cannot be had in this suit without the defendants, between

themselves, litigating their respective rights to the waters of Walker River, then it would seem to follow that every person claiming rights in the Walker River would be a necessary party defendant, and that the bill should be dismissed without such parties are made defendant.

This necessity for other parties was held not to exist according to the ruling of Judge Hawley in this case, on demurrer, 127 Fed., page 573.

And see

Union Mill & Mining Co. *vs.* Danberg, 81 Fed., 73.

The jurisdiction of the United States Court is of a *controversy* between citizens of different States. It has no jurisdiction except of such controversy. This excludes independent controversies of all characters, and under all circumstances, however, the same may be presented, and however the same might arise *between citizens of the same State*. So that in order that any controversy between citizens of the same State may be tried in the Federal Court, it is absolutely necessary that such controversy in some manner relate to the original controversy. The mere fact alone that the trial of such controversy between citizens of the same State will lead to the fuller determination regarding a thing, about which some proceeding is before the court, is not sufficient to confer jurisdiction upon the Federal Court. It is necessary, not alone that a fuller determination might be had, but that the fuller determination shall be of the original controversy, set out in plaintiff's bill of complaint.

Where the cross-bill introduces a controversy between defendants *resident of the same State*, it is not a question of equity practice alone which must determine the right to file the cross-bill, but it is one coupled with jurisdictional power of the court.

The discretion of a court of equity does not exist until after its jurisdiction exists. Its discretion must be within the jurisdiction conferred and cannot be outside of or beyond

it. So that the liberal rules resting in a court of equity with regard to discretion cannot carry the exercise of that discretion beyond the limitation of its jurisdiction. In this case, therefore, the jurisdiction of the court to try the controversy between Rickey and his codefendants, citizens of the State of Nevada, cannot rest in the discretion of the Federal court. It must find a resting place and foundation in some connection with the original controversy set forth in the complainant's bill of complaint. This is what we understand to be the ancillary jurisdiction, where the Federal courts are authorized to try controversies between citizens of the same State.

In *Vannerson vs. Leverett*, 31 Fed., 376, Vannerson & Leverett were sued in a creditor's bill in the United States Court as copartners. Vannerson by cross-bill sued Leverett to determine the indebtedness between them as copartners. Vannerson & Leverett were citizens of the same State. The court said:

"If it be true that Vannerson & Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross-bill filed to an original bill against them both which he could not have obtained by original bill here; and in other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies *inter esse* in this court. * * * Most clearly, if the plea is true Vannerson had no standing in this court as a suitor by original bill. He prayed no relief against Bates, Reed, and Coolley. His cross-bill has no relation to the subject-matter of their suit, nor is this cross-bill in any sense a reply to allegations in the original bill. The Circuit Court of the United States is limited in its jurisdiction, and, when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted. * * * The limited jurisdiction of the courts of the United States cannot be enlarged by the action of the parties litigant therein, and if the want of

jurisdiction at any time appears, the court, *sua sponte*, will raise the question whether the parties had or had not. The argument that the original bill was a creditor's does not and cannot enlarge the jurisdiction of a court so limited, nor does the argument *ab inconvenient* of the solicitor for the complainant have any place in such a court."

For this additional reason, this lack of jurisdiction in the court to hear the controversy made by the cross-bills, because the parties are both residents of the State of Nevada, the cross-bills should not have been filed and therefore furnished an insufficient foundation for the judgment restraining the prosecution of the action in Mono County.

In an action to quiet title to water the plaintiff's complaint determines the limits of the thing to be inquired into. If the plaintiff in an action to quiet title alleges ownership in a lot, no defendant can extend the inquiry to another lot or to any other property. In this case Miller & Lux have fixed the limits of the inquiry to a certain 943 29/00 cubic feet of water per second which it claims a prior right to receive and use. This claim is made up of the quantity of water and the relative time of its use. No controversy can arise in this case unless it is with reference to this quantity of water or to the time of its use. The cross-complainants concede all the rights claimed by the complainants Miller & Lux and assert no claim whatever against the complainants. In the case of Ames Realty Co. *vs.* Big Indian Mining Co. the cross-complainants asserted rights against the complainant as well as against their codefendants. Even under the facts of that case Judge Hunt did not feel secure in resting his ruling upon the right of defendants as between themselves to file a cross-bill, but fortified that by placing his decision ultimately upon the procedure authorized by the statute of the State, which he adopted. Says that judge: "But if under the old chancery practice, no affirmative relief could be given to these defendants, under their cross-

bills, still the courts of the United States will not deny jurisdiction to proceed under the statute of the State already quoted."

All of Judge Hunt's conclusions as to what is the rule independent of statute are contained in the latter part of the paragraph at top of page 172. The learned judge there says: "Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the question in the affirmative." Is the determination of such property right ancillary in the sense in which that character of jurisdiction is understood? We have always understood this rule of ancillary jurisdiction was a rule of necessity, which rule aided the defendant in putting in his full defense to the controversy made by the original bill. If such ancillary jurisdiction was meant by Judge Hunt, then his answer should have been in the negative, because the very next sentence shows that a full determination of the original controversy could have been had without the cross-bills. The judge says, "It is true that if complainant can secure protection of its own rights junior appropriators might be left to fight out their respective rights among themselves. And we claim that this sentence covers our case, and shows that the controversy made by the cross-complaints is not ancillary. We are unable to reconcile *Union Mill and Mining Co. vs. Dauberg*, 81 Fed., 73, and the decision on demurrer in this case of *Miller & Lux vs. Rickey*, 127 Fed., 537, with the rule announced in this *Ames Realty Co.* case, as to the right of the defendants between themselves to determine their rights to the stream. In both of these last-named cases it was held that parties not made defendants, but who diverted water from the stream need not be made parties defendant. They would be necessary parties if, as said by Judge Hunt, "it is impossible to make a just decree between complainant and one defendant without ascertain-

ing rights of defendants as against one another." Since a "just decree" must always be rendered, and all parties must be before the court so that a "just decree" can be rendered, it would follow from Judge Hunt's reasoning that all the persons diverting water must be before the court, and that the complainant's bill will be dismissed unless he brings them all in, so that a "just decree" can be rendered as to the defendants. This is contrary to the decisions cited.

If the defendants other than Rickey can file cross-bills against him to assist their defenses to the main controversy, then he should have the same privilege against them. He cannot do this because his rights to the water are confined to the portion of the stream in California, which portion of the stream is without the jurisdiction of the Circuit Court of Nevada. If the cross-bills here are permitted as against the defendant Rickey, he is denied the same right to have his claims adjudicated affirmatively between himself and his co-defendants.

As to rules determining when cross-bills can be filed generally we refer to the authorities filed with our petition herein.

New parties cannot be introduced by a cross-bill.

Shields *vs.* Barrow, 17 How., 130.

Bates Eq. Pro., §§ 374-5.

To this point we have argued the jurisdiction of the court as though defendant Rickey still owned the property in California and as though he was the plaintiff in the suits in Mono county. That manner of presenting the argument was also adopted in the brief accompanying the petition to this court.

Identity of Rickey and the Petitioner.

To justify the order of injunction against the petitioner here, the respondent asserts the identity of Rickey and the Rickey Land and Cattle Co. This identity was evidently

found against this position of the respondent, because the court relied upon the rule of *lis pendens*, which assumes privity not identity. The facts are also to the contrary. Charles Rickey owned \$20,000 *in value* of the capital stock of the corporation and Alice B. Rickey owned stock of the same value, pages 18 and 19, folios 39-41. Respondent also suggests that the Rickey Land and Cattle Co. should be considered as the defendant T. B. Rickey, because there is no statement in the affidavit that either Alice B. Rickey or Charles Rickey acquired their stock in the corporation by payment of a valuable consideration. Respondent concludes from the silence of the affidavit that they paid nothing whatever. We do not know how this conclusion of fact follows, particularly when the burden of showing facts to justify the injunction prohibiting the prosecution of the actions in Mono county was upon the respondent. Regardless of this, however, it seems to be entirely immaterial, so far as the doctrine of *lis pendens* is concerned. The rule where applicable is binding whether the transfer is a gift or for the most valuable consideration. On the question of the identity of T. B. Rickey and the Rickey Land and Cattle Co., the question of consideration paid by Alice Rickey and Charles Rickey for the capital stock of the corporation owned by them is not material. There is no interest claimed by any party to the suit in the thing transferred. There is no question to be affected by the doctrine of *bona fide* purchaser or where the question of notice or consideration becomes material. Defendant Rickey could give or sell to other members of the corporation without violating any rights of the complainant or of the cross-complainant. After he had given or sold, the interest given or sold would belong to the donor or purchaser as absolutely in the one case as in the other.

The allegation in the complaint attributing to the defendant Rickey an intention to defeat the jurisdiction of the Circuit Court of Nevada by filing complaints in the State Court

of Mono county is denied by Mr. Rickey at pages 16 and 17, folios 35-36. At folio 37 the defendant Rickey states the reason for commencing the action in the State Court.

Rule of Lis Pendens Erroneously Applied in This Case.

We contend that any judgment in the original case of *Miller & Lux vs. T. B. Rickey* and others must, because of the limit upon the jurisdiction of the Circuit Court of Nevada, be one *in personam* against Mr. Rickey, and that doctrine of *lis pendens* will not apply to the lands situated in the State of California, and that therefore the Rickey Land and Cattle Company would not, as to the lands in the State of California, be bound in any manner by such judgment.

Second. That any judgment that might be rendered in the suit of *Miller & Lux* could not affect the title of lands in the State of California.

In speaking of such a judgment *in personam* Judge Fuller, in the case of *Carpenter vs. Strange*, 141 U. S., 87, says:

"While by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title * * *

"Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained of the person notwithstanding lands not within the jurisdiction may be affected by the decrees (*Massey vs. Watts*, 6 Cranch, 148) yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated."

Pomeroy's Eq. Jurisprudence, in sec. 298, says:

"It should be carefully observed however that a decree in such a suit directing a conveyance of the land under the contract, or in pursuance of the trust or directing a sale or conveyance of the partnership land, or a transfer of the estate affected by the fraud,

only binds and operates upon the person of the defendant; it is not of itself a muniment of title and does not of itself transfer any title."

In *Watkins vs. Holman*, 16 Peters, 25, the rule is announced:

"The court of chancery acting *in personam* may well decree the conveyance of land in any other State and may enforce their decrees by a process against defendant, but neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

If, then, any decree that may be made in the Federal Court in Nevada in the suit of *Miller & Lux* cannot affect the title of lands in the State of California, the doctrine of *lis pendens* would not apply so as to make such decree binding upon the *Rickey Land and Cattle Company*. Therefore the decree restraining the prosecution by the *Rickey Land and Cattle Company* of the actions in Mono County to quiet its title is erroneous.

The doctrine of *lis pendens* has no application to a judgment that is personal.

Baltimore & Ohio Co. vs. Wabash Railroad Co., 119 Fed., 678.

Merritt vs. The American Company, 79 Fed., 228.

The doctrine of *lis pendens* is confined to the territorial jurisdiction of the court and does not cross beyond it.

Carl vs. Lewis Coal Company, 96 Missouri, 149.

Sheldon vs. Johnson, 4 Sneed (Tenn.), 683.

Another rule of *lis pendens* is that the complaint must specially describe the property to be affected, so that the purchaser from the defendant may be able, by examining the records, to ascertain what particular property of the defendant is the subject of litigation.

In the complaint of Miller & Lux there is no attempt whatever to describe the property of Mr. Rickey to be affected by the litigation, so that the purchaser from Mr. Rickey could not, even if the law required him to examine the records of Nevada, when purchasing property in the State of California, have ascertained what property was affected by the litigation.

In Black on Judgment, at section 550, the rule is stated as follows:

"It is also said that two things seem to be indispensable to give effect to the doctrine of *lis pendens*:

"First: That the litigation must be about some specific thing which must necessarily be affected by determination of this suit; and second, that the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation."

Mr. Freeman, in his work on Judgment, at sections 196 and 197, states the rule as follows:

"To determine whether an action or proceeding will put in operation the doctrine of *lis pendens*, one must inquire whether this object is to affect specific property or not. If the relief sought includes the recovery of possession or the enforcement of a lien or the cancellation or creation of a muniment of title or any other judicial action affecting the title, possession or right of possession of specific property, real or personal, then there is or may be a *lis pendens* sufficient to bind all subsequent purchasers or incumbrancers. If on the other hand no specific property has to be recovered, there is no *lis pendens*."

"It is further essential to the existence of *lis pendens* that the particular property involved in the suit be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril."

Also see—

Houston *vs.* Timmerman, 17 Oregon, 499.

Bates *vs.* Gillette, 30 Fed., 685.

The complaint specifically described the property of Miller & Lux, which was the subject of the suit, but attempted no description of the property of Mr. Rickey; therefore, independent of the other reasons herein stated why the doctrine of *lis pendens* would not apply, the failure of a description would exclude the doctrine as against a purchaser from Mr. Rickey.

There is no allegation in the complaint that the organization of the corporation, The Rickey Land and Cattle Company, was for the purpose of defeating in any way the jurisdiction of the court of Nevada. There is no allegation of any attempted fraud.

In order that any decree of injunction rendered by the Federal court in the suit of Miller & Lux might be binding upon the Rickey Land and Cattle Company, one of three conditions would be necessary:

First. The Rickey Land and Cattle Company would have to be a party to the suit.

Second. The Rickey Land and Cattle Company would have to be bound by the judgment rendered under the doctrine of *lis pendens*, in which instance it would seem that the proper proceeding for the plaintiff would have been to have made the Rickey Land and Cattle Co. a party defendant to the original suit of Miller & Lux. This they have not done. And if our contention in this case is correct, the doctrine of *lis pendens* has no application, and it is probable that the court would not have made the Rickey Land and Cattle Company a party to the original suit of Miller & Lux if application had been made.

Third. The identity of the Rickey Land and Cattle Company and Thomas B. Rickey as one and the same person under different names would have to be established, so that the change in name would be a mere immateriality, the substance of ownership being the same. In such a case, with the proper allegation of fraud and of fraudulent intention, the court might ignore the change of name and enforce the

decree. In this case, however, the fact of identity between Thomas B. Rickey and the Rickey Land and Cattle Company is not established, and there are no allegations of fraud sufficient to justify the court in ignoring the actual facts as they exist, and in treating the Rickey Land and Cattle Company otherwise than as the successor of T. B. Rickey.

But, admitting for the sake of argument the application of the doctrine of *lis pendens* as to any judgment between Miller & Lux and T. B. Rickey, how could any such doctrine aid the complainants herein, who had not, at the time of the commencement of the suits in Mono county, filed their cross-complaints in the Miller & Lux suit in Nevada.

Does the doctrine of *lis pendens* compel a purchaser to anticipate that some person is going to make a claim? If it requires the purchaser to be bound by a judgment in a pending suit, does it also bind him to a judgment upon facts which at the time of purchase had not been asserted in any form of legal proceedings?

Summary.

First. In the original suit of Miller & Lux, the Federal court of Nevada had no jurisdiction to try and determine the rights of T. B. Rickey to the waters in the State of California, and the Federal court, having no such jurisdiction, the prosecution of the action in Mono county could not in any way conflict with it.

Second. That any judgment rendered in the original action in the Federal court would necessarily be *in personam*, and would not affect the title of the property of T. B. Rickey in the State of California, and therefore such judgment would not be binding, under the doctrine of *lis pendens*, against the successor in interest to T. B. Rickey to the property in the State of California, the Rickey Land and Cattle Company.

Third. That the jurisdiction of the court is not extended by the cross-bills, and the court has no jurisdiction under the cross-bills, for the same reason that it had no jurisdiction in the original bill, to try the title of T. B. Rickey to waters in the State of California.

Fourth. The Federal court had no jurisdiction as between the cross-complainants and T. B. Rickey to try the title of T. B. Rickey to the waters in the State of California. This for the same reasons that it had no right to try the title of T. B. Rickey in the State of California as between Miller & Lux and T. B. Rickey. As to the cross-bills, the same not being filed before the time of the purchase by the Rickey Land and Cattle Company of the interest of T. B. Rickey to the waters in the State of California, the doctrine of *lis pendens* would not apply so as to give notice of the claims made in the cross-bills in advance of its commencement.

Fifth. That the cross-bills upon which the ancillary bill for injunction was based was not proper proceedings in the original action: (a) because it was not filed in aid of any defense or discovery or for the purpose of a full determination of the controversy set out in the original bill; (b) because it sought to have tried by the Federal court of Nevada an independent controversy between citizens of the State of Nevada, and therefore the court had no jurisdiction of such independent controversy.

Sixth. The ancillary bill of *complaint* in this case against the Rickey Land and Cattle Company is against a corporation not a party to the original action.

Seventh. The prosecution of the action in Mono county, assuming a jurisdiction to exist in the Federal court of the same subject-matter, did not impair, interfere with or restrict in any manner the full exercise of the jurisdiction of the Federal court. And if the actions to quiet title in Mono

county can not now be maintained, they never can be, because they will after judgment in the Federal court be as objectionable as they are now, and as the injunction prayed for is perpetual, it follows that the title to this property can never be quieted.

The appellant, for the reasons herein stated and the rules of law herein adduced, respectfully submits that a judgment of the Circuit Court of the United States, Ninth Circuit, District of Nevada, enjoining the prosecution of the suits in Mono county as to Miller & Lux and as to Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnson should be reversed.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Petitioner

FILED.
JAN 12 1910
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. **5**

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSTON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

W. B. TREADWELL,
Solicitor for Respondents.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
FRANK H. SHORT,
ISAAC FROHMAN,
EDWARD F. TREADWELL,

Of Counsel.

(21,056)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSTON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

The most important questions in this case are precisely the same as those in the case of *Rickey Land & Cattle Co. v. Miller & Lux*, No. 89 on the docket of this court for the present term, and it seems to us unnecessary that we should here cover the ground already covered in that case. Therefore we beg leave to refer to respondent's brief on the merits in that case for our argument as to the matters common to both cases without further reference to those matters here.

As we have not yet seen petitioner's brief on the merits in the present case, we shall be compelled to assume that the points to be made by it on this argument are those indicated

by it on its application for the writ of certiorari herein and raised by it in the courts below.

As in case No. 89, this is an appeal from an interlocutory injunction granted by the United States Circuit Court for the District of Nevada in aid of its prior jurisdiction in the case of *Miller & Lux v. Rickey*, restraining the Rickey Land & Cattle Co., as a privy to, and purchaser *pendente lite* from, Thomas B. Rickey, a defendant therein, from prosecuting two subsequent actions brought by it in the Superior Court of Mono County, California. The only difference between this case and case No. 89 is that the suit in No. 89 was commenced by Miller & Lux, the *complainant* in *Miller & Lux v. Rickey*, while the suit here involved was commenced by the respondents here, who were *defendants* in the suit of *Miller & Lux v. Rickey*, and who had filed cross-bills therein against their codefendant, Thomas B. Rickey. Those cross-bills were filed therein, and process thereon actually served on said Rickey after the commencement of said actions in the State court, but before process in said last-mentioned actions had been served. Thereupon said cross-complainants (respondents here) filed the bill here in question, *ancillary* to the original suit of *Miller & Lux v. Rickey*, to obtain the injunction here appealed from. All the other facts in this case are the same as in case No. 89.

As will be seen, the position of the respondents herein, as *defendants* and *cross-complainants* in *Miller & Lux v. Rickey*, constitutes, in the opinion of counsel for petitioner, a material difference between the two cases, 89 and 94, and he contends that, even if it should be held that the injunction granted in favor of Miller & Lux, the complainant in the original suit, was properly granted, such is not the case as to the injunction in favor of these respondents. In that behalf, he contends, *first*, that our cross-bills were improper, and gave us no standing as against Rickey, and, *second*, that as those cross-bills were filed after the commencement of the actions in the State court, they conferred no right to this injunction, although the process on them was the first served.

In this brief we shall contend:

I.

1. That those cross-bills were regular and jurisdictionally sufficient against Rickey;

II.

2. That the Circuit Court had priority of the controversy involved in those cross-bills, because:

(a) They were protected by its original priority in the suit of *Miller & Lux v. Rickey*; and

(b) The fact that process on these cross-bills was served before process was served in the actions in the State court gives them priority.

For all other points we ask leave to refer to respondent's brief in case No. 89.

ARGUMENT.

I.

THE CROSS-BILLS HERE IN QUESTION WERE REGULAR AND JURISDICTIONALLY SUFFICIENT AGAINST RICKEY.

As we understand, counsel for petitioner does not dispute the general rule that in a suit in equity a defendant may file a cross-bill against a codefendant, and that, indeed, he must do so if he desires to obtain affirmative relief against him. But he contends that in the Federal courts, when the defendants are, as here, citizens of the same State, such a cross-bill must be *purely defensive*; that it must relate *solely* to the very controversy initiated by the original bill, and must set up no other controversy, even though relating to the same subject-matter. In other words, he says that such a cross-bill must confine itself to stating matters constituting a defense,

or in aid of a defense, to the claim of the original complainant, and that if it sets up any other controversy, however germane to the suit, it is as to such matter an *original bill*, and to that extent bad for want of jurisdiction.

We are not concerned here to inquire whether or not the rule is as counsel so claims, except to say that even under the authorities which he cites he has narrowed it too much, and that it is entirely proper for such a cross-bill to set up any matter which will enable the court to do more exact or complete justice between the parties *with relation to the controversy brought before the court by the original complainant*. Such a matter would, of course, be defensive, and we understand that counsel does not dispute the correctness and necessity of the addition of such a qualification to the rule he claims. For the purpose of this argument only, then, we are willing to concede the correctness of the rule so stated by counsel, with the qualifications we here suggest, and we believe that we can easily show that our cross-bills are proper and valid, even according to that supposed rule.

By said cross-bills (pages 7-8) these respondents claimed certain rights to the water of Walker River, and complained of certain wrongful diversions of said water by said Rickey above their lands and ditches, and sought to restrain such diversions by him. That such allegations and prayers did tend to enable the court to do more exact and complete justice between the parties *with relation to the claim of Miller & Lux* may be well illustrated by putting a supposed case somewhat simpler:

Suppose that A brings his bill against B and C, in which he alleges that he is a proprietor on a stream, and entitled at all times to divert 10 feet therefrom, and that the defendants, B and C, without right, but under claims of right, are diverting the waters of the stream above him, and thus preventing any water from reaching him, and he therefore prays an injunction against them. B and C severally *answer*, each admitting that he is diverting 10 feet from the stream, and

seeking to justify that diversion by a completed right of appropriation. There being no pleading but bill and answers, the court on the hearing finds the facts to be that A, B, and C are each appropriators, each having lawfully appropriated 10 feet; that A is first in priority, B is second, and C last, and that C is the highest up the stream, B next, and A lowest down, and the injunction prayed for by A is granted. A subsequently complains that B has violated the injunction, and has him cited for contempt. On the hearing of the contempt proceeding it appears that C has been diverting 20 feet and B 10 feet at a time when there was only 30 feet in the stream. As the result of those *combined* diversions, A has been totally deprived of water. B contends that he has committed no wrong; that he has only taken the quantity which he had been adjudged entitled to take, and that there would have been enough water for A had it not been for the wrongful excess diverted by C. He therefore claims that C is the one, and the only one, to be punished. But the court says to him: "No, you yourself have violated the injunction, and must bear the consequences. You cannot compel the complainant to proceed against C if he chooses not to do so. Had you filed a cross-bill against C, *you* could have had him enjoined, and thus protected yourself against what must be admitted to be an unjust use of the injunction granted to A; but you did not do so, and there is now no way in which you can be relieved."

In the supposed case no one would deny that an injustice had been done to B; that that injustice was caused by the relief granted to A, and that there ought to be *some* way by which such injustice could be prevented. Is it not true that there *is* such a way, and that such a cross-bill as we have supposed the courts to have suggested would have been strictly defensive, and solely designed to enable the court to do complete justice between the parties as to the very controversy initiated by A? Without such a cross-bill, there is no way in which truly *equitable* relief can be granted, for the

complainant in such a case is entitled to treat every wrongdoer as a several trespasser if he desires, and cannot be compelled to proceed against them jointly, nor to proceed against any one of them against his will.

The cross-bills filed by us in this case are exactly of the nature of those in the case supposed. Rickey is above us on the river, and stands in the place of the imaginary C. Unless we can maintain these cross-bills Miller & Lux, should it establish the priority it claims, will be able to punish us for the acts of Rickey, and the decree which the court must render, although such as *Miller & Lux* may be strictly entitled to, will not do exact or complete justice between the parties. We submit, therefore, that our cross-bills are strictly defensive in their nature; that our controversy with Rickey is a part of the very controversy brought before the court by the original bill of Miller & Lux, and that these cross-bills are therefore proper and valid, even according to the test suggested by counsel.

This proposition was expressly so decided in the like case of *Ames Realty Co. v. Big Indian M'g Co.*, 146 Fed., 166, 169, in which case a similar illustration was given, and we submit that reason and equity imperatively demand such a rule.

II.

THE CIRCUIT COURT HAD JURISDICTION OF THE CONTROVERSY INVOLVED IN THESE CROSS-BILLS PRIOR TO THAT OF THE STATE COURT.

(a) *The cross-complainants were protected by the original priority of the Circuit Court in the suit of Miller & Lux v. Rickey.*

If we are right in what we have said under the preceding head, our cross-bills were strictly defensive, and were therefore merely an ordinary step in the case, like an answer, re-

lating to the controversy of which that court had already acquired prior jurisdiction, and not initiating any new controversy. The actions in the State court were therefore attempts to give to the State court jurisdiction of a controversy already *pending* in the Circuit Court.

(b) *The fact that process on these cross-bills was served before process was served in the actions in the State court gives priority to those cross-bills.*

Except in a very limited class of cases, of which this is not one, the question of priority of jurisdiction depends solely upon the respective dates of service of process.

Bell v. O. L. & T. Co., Fed. Cas., 1260.

Union Mut. Life Ins. Co. v. University of Chicago,
6 Fed., 443.

Owens v. O. Cent. R. Co., 20 Fed., 10.

U. S. v. Lee, 84 Fed., 626, 631.

U. S. v. Eisenbeis, 112 Fed., 190, 196.

In the court below counsel for petitioner cited the case of *Farmers' Loan & Trust Co. v. Lake Street, &c., R. Co.*, 177 U. S., 51, as declaring a principle which would take this case out of the operation of the above rule. But that case contains nothing applicable to the present one. It merely decides that in suits *in rem*, and those which in their nature may compel the court to take possession of property to be affected, the mere filing of the bill and issuance of process gives the court jurisdiction of the *res*. The language of that case, cited by counsel, is as follows (page 61):

"As between the immediate parties, in a proceeding *in rem*, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served in accordance with the rules of practice of the court. * * *

"Nor is the rule restricted in its application to cases where property has been actually seized under ju-

dicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

It is obvious that this case is not within the rule there laid down. The actions brought by the petitioner in the State court were not *in rem*, nor within any of the other categories mentioned in that case, nor *could* that court have lawfully assumed the possession or control of any property in those cases, nor was it asked to do so. Those actions, as well as the one in the Circuit Court, being only *in personam*, priority in the service of process must control.

We submit that the order appealed from was rightly affirmed by the Circuit Court of Appeals.

Respectfully submitted,

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Solicitor for Respondents.

ALDIS B. BROWNE,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

I.

Abatement or Stay of an Action.

"It is an ancient rule of the common law that a man shall not be *twice vexed* for one and the same cause; and the pendency of a former suit in the same jurisdiction between the same parties for the same cause of action and relief may be pleaded in *abatement* of a second suit."

Ency. Pl. & Prac., vol. 1, title "*Another Suit Pending*," p. 750.

But—

"It is a proper ground for *continuance* that the debt for which the suit is brought has been attached

"in a prior and pending action in the same or in another state by a creditor of the plaintiff."

Ibid., p. 767, citing—

Winthrop v. Carlton, 8 Mass., 256.

Harvey v. Great Northern R. Co., 50 Minn., 405.

Blair v. Hilgedies, 45 Minn., 23.

Lynch v. Hartford Fire Ins. Co., 17 Fed. Rep., 627, and other cases.

This upon the ground that the *res* is within the jurisdiction of the court wherefrom attachment issued.

So here, the *res*, to wit, the land of the complainant; its water rights and the locus of the water, to wit, Walker River, are all within the limits of the jurisdiction of the Nevada Circuit Court. The bill thus stated a case within such jurisdiction. The defendants' plea denies the jurisdiction only in respect of water flowing in California. The *relief* prayed is one thing—the defense another. If the court has power to grant relief because of the status of the parties, the injury and damage being admittedly located in Nevada, then the entire cause is within its jurisdiction. The order entered in each case (89 and 94) only directs the defendants to cease from prosecuting the suits in the California State Court "pending the final hearing and determination of this suit" and until the further order of the court."

R., 89, p. 29; R., 94, p. 21.

We also call particular attention to the case of *French, trustee, vs. Hay*, 22 Wall., 250, cited in the opinion below in No. 89 (R., 48, 49). There injunction issued to restrain the defendant from prosecuting in the courts of another jurisdiction a suit founded upon a judgment he had wrongfully obtained from a State court, when such latter cause had been lawfully removed into the Federal Court. Such power was assumed and exercised to prevent a manifest injustice, the court declaring—

"Having the possession and jurisdiction of the case,
"that jurisdiction embraced everything in the case

“and every question arising which could be determined in it, until it reached its termination and the jurisdiction was exhausted.”

II.

Concurrent Jurisdiction.

The petitioner's counsel claim that the California court has sole jurisdiction over Miller & Lux—the original claimants in the Nevada suit—to determine their rights to any water in the Walker River in California, although their diversion of such water occurs in Nevada. Clearly, therefore, the Nevada court in turn has jurisdiction to determine the rights of the same complainants in the same stream and *its* jurisdiction was first invoked. The argument at the bar and on the briefs is that the California court can and may decree *in result* the rights of all parties in the Nevada case to the use of the water flowing in Walker River, and hence it may so decree that *no water* could reach Nevada and the interstate stream in Nevada would of course disappear.

Now it is settled law that there can be no right in the *corpus* of water flowing naturally. Such rights arise by diversion and use. The argument then is that a flowing object, precisely as an immovable object, such as land, appertains to the jurisdiction alike, so that water, when it enters a State, is within the sole jurisdiction of that State and subject to complete exhaustion of the stream by use to the extent that no jurisdiction attaches thereto in any possible way in the lower State through which the *water-course* in its natural state would pass. If that be the result, then the courts of the lower State could adjudicate nothing thereover—simply because on such doctrine there would be no physical *res* on which its process could operate. But it is not alleged here as a *fact* that there is no water flowing in the Walker River in Nevada. The original bill R., 89, par. 7, p. 3) avers diversion “of a large portion of said water to which your

"orator is so entitled." With the land of complainant situate in Nevada, its water right used there and the alleged damages committed there, then clearly the Circuit Court for Nevada can hear and determine whether the complainant's rights in Nevada are in fact injured regardless of the *locus* of the *cause* of such injury. Otherwise both *res* and *jurisdiction* are transferred entirely to California solely because that State is situate higher up on an interstate stream flowing through each State, and may appropriate all the water thereof. Of course, if that contention be sound law, the jurisdiction of the court in the lower State would be extinguished by the physical fact of entire appropriation of the stream in the upper (California) State.

But as a water-course running through both States is common to both, then it must follow that there is concurrent jurisdiction over the water stream as such, and the rule would hence justly obtain that the court first obtaining jurisdiction of the matter would retain such exclusive jurisdiction until final determination of the cause.

Shelby v. Bacon, 10 How., 56, 68.

In *Wiel on Water Rights in the Western States* (second edition, pages 168-175), under the title "Interstate Streams," appears a statement of the rulings of the courts of the arid States then (1908) announced on this important subject, including a full statement of what the court decided in *Willey v. Decker* (11 Wyoming, 496; 100 Am. St. Rep., 939; 93 Pac., 210), cited on our main brief in No. 89.

And, at page 311, the same author briefly discusses "*Where suit can be brought—Jurisdiction*," with citation of the two cases also on our main brief, and to the result contended for by us.

In *Kansas v. Colorado*, 206 U. S., 46 (at page 85), this court said:

"The right to a flow of a stream was one recognized
"at common law for a trespass upon which a cause
"of action existed."

And, at pages 103, 104, the court quotes at length from the opinion of Chief Justice Shaw in *Elliott v. Fitchburg Railroad Company*, 10 Cush., 191, 193, 196, as quoted in turn from *Clark v. Allaman*, 71 Kansas, 206, wherein that eminent jurist clearly states the common-law rule *in extenso*, saying, *inter alia* (page 104) :

“That a portion of the water of a stream may be
 “ used for the purpose of irrigating land, we think is
 “ well established as one of the rights of the pro-
 “ prietors of the soil along or through which it
 “ passes. Yet a proprietor cannot under color of that
 “ right, or for the actual purpose of irrigating his
 “ own land, wholly abstract or divert the watercourse,
 “ or take such an unreasonable quantity of water, or
 “ make such unreasonable use of it, as to deprive
 “ other proprietors of the substantial benefits which
 “ they might derive from it, if not diverted or used
 “ unreasonably. * * *

“This rule, that no riparian proprietor can wholly
 “ abstract or divert a watercourse, by which it would
 “ cease to be a running stream, or use it unreasonably
 “ in its passage, and thereby deprive a lower proprie-
 “ tor of a quality of his property, deemed in law in-
 “ cidental and beneficial, necessarily flows from the
 “ principle that the right to the reasonable and bene-
 “ ficial use of a running stream is common to all the
 “ riparian proprietors, and so, each is bound so to use
 “ his common right, as not essentially to prevent or
 “ interfere with an equally beneficial enjoyment of
 “ the common right, by all the proprietors. * * *

“The right to the use of flowing water is *publici*
 “ *juris*, and common to all the riparian proprietors;
 “ it is not an absolute and exclusive right to all the
 “ water flowing past their land, so that any obstruc-
 “ tion would give a cause of action: but it is a right
 “ to the flow and enjoyment of the water, subject to
 “ a similar right in all the proprietors, to the reason-
 “ able enjoyment of the same gift of Providence. It
 “ is, therefore, only for an abstraction and depriva-
 “ tion of this common benefit, or for an unreasonable
 “ and unauthorized use of it, that an action will lie.”

This doctrine must apply between the States as "interstate common law" and as between individuals of different States claiming rights to the use of water of interstate streams. For such unlawful diversion a court of equity may (as here) exercise its jurisdiction to hear, determine, and restrain parties where injury to one is done or threatened by another *if* the court has jurisdiction of the parties, and certainly where there is the adde*d* fact that the injury is done to the land of an owner within its jurisdiction. To deny that right is plainly to put it in the power of one State, by its statutes, or its courts by rulings, to *in fact* ignore and deny this right to equal enjoyment of nature's gift.

The question as presented in this class of cases is *sui generis*. It is an attempt to apply the law respecting immovable property to a flowing stream, and then assert thereon an exclusive jurisdiction merely because the upper State on an interstate stream *happens* to enjoy the advantage of location merely. As said in *Willey v. Decker, supra*, and other cases, *water*, unlike *land*, knows no State boundaries. When, then, a court of equity has jurisdiction of a case involving this *movable* object and is called upon to determine rights thereunder, it is going far to deny the right of prior adjudication to that court on the ground that a court of another jurisdiction over a subject of common interstate right and ownership has been later invoked in effect to determine the same relative rights *inter partes*. It is far less difficult and far less productive of unseemly judicial conflict, if it be held in such a case as is here presented that the *res* is in fact within the jurisdiction of the court whereto the parties have first resorted, and hence draws with it the right in such court to ascertain and determine the rights of those seeking relief at its hands. When the use of the water is matter of common right it must follow logically that the protection of such right, *inter partes*, is matter of concurrent judicial power or jurisdiction and priority of suit, hence gives priority of adjudication in the court of either State wherein this common

and equal right of use extends. If the law be an advancing science to meet the development of human needs, *this* conclusion does not destroy the ancient landmarks nor uproot established principles. *Contra*, it stands approved by reason far more than to hold subject to the law of mere procedure affecting immovable property the waters of a flowing stream, which are so vital an element in human existence.

It may be pertinently added that proceedings in California to adjudicate water rights are brought under section 738 of the Civil Code of that State as in equity, and as pointed out by this court in *Devine v. Los Angeles*, 202 U. S., 313, 333, the court adding:

"This statute enlarged the ancient jurisdiction of courts of equity in respect of suits to quiet title, but the equitable rights themselves remaining, the enlargement thereof may be administered by the circuit courts of the United States as well as by the courts of the State. *Broderick's Will*, 21 Wall., 503; *Holland v. Challen*, 110 U. S., 15; *Gormley v. Clark*, 134 U. S., 338, 348."

As the original suit by respondent in No. 89 in the United States Circuit Court for Nevada is also in equity, the issues and the relief prayed in one are in fact and legal effect that sought in the other. They hence seek a common purpose, over common subject-matter, and, in respect of property (water), of common interstate right, to wit, an interstate stream having movable *locus*.

III.

Petitioner Bound as Purchaser Pendente Lite.

In addition to the argument upon the main brief in No. 89, pages 29, 31, on this head (adopted by reference in the brief in No. 94), we add only one further suggestion.

Thomas B. Rickey, defendant in the original suit, is the president of the Rickey Land and Cattle Company, petitioner

herein. That appears from his signature as such in this record (No. 89, R., 31; No. 94, R., 27). This was notice to the company and binds it *pendente lite*. This point was directly involved and so directly ruled in *Whiteside v. Haselton*, 110 U. S., 296, 300, where, in speaking of a decree against Haselton, it was said:

"It is argued that it does not bind the Bartow Iron Company, who were innocent purchasers from Haselton. But they bought *pendente lite*, and by the well-known rule on that subject, are bound by this decree. The suit was commenced December 5, 1874, Haselton's answer filed April 14, 1875, and the deed, though without date, from Haselton to the company, is acknowledged September 8, 1875.

"It is apparent also that during all the time Haselton was president of the Bartow Iron Company. The fact that the corporation was organized under the laws of another State does not, under these circumstances, relieve it from the rule which governs purchase of property pending litigation about the title."

The original bill of Miller & Lux was filed and process served on Rickey on June 10, 1902. Thereafter, it asserts, viz., August 6, 1902, Rickey—

"caused the defendant (in present bill) the Rickey Land and Cattle Company, to be organized and incorporated, and it was on that day organized and incorporated under the laws of the State of Nevada."
(No. 89, R., 2, 3; No. 94, R., 4, pars. 11 and 12.)

On these facts, which are not denied, the rule as applied in *Whiteside v. Haselton*, *supra*, is plainly applicable.

IV.

The Cross - Bill.

Our main brief (pages 3, 6) clearly discloses wherein the cross-bill is strictly defensive, and hence material to a decree which will do exact justice between all the parties litigant. The same line of reasoning is set forth in the opinion of the Circuit Court of Appeals (R., 32-35). If all parties be enjoined as prayed and violation of such injunction be thereafter alleged and found, the parties so enjoined, who may be innocent of such wrong-doing, would be otherwise made to suffer unfairly by a purely blanket decree. To avoid such consequences these defendants had the right to file their cross-bill, because it was (1) germane to the original bill and (2) essential to a just decree therein protecting them from subsequent harm. Hence, in such a case as this, where *several* ~~divisible~~ interests in running water were asked to be determined, *priority* and *quantity inter partes* were matters of plain and necessary judicial inquiry and resulting decree. It was equally matter of defense. The cross-complainants were entitled, if enjoined, to be clearly and definitely advised by such decree of the precise limitations of such order *as against them and against each other*. Such being the plain legal effect of the cross-bill as pleaded, the argument that further express averments are essential to sustain the certain and necessary conclusions to be drawn from the pleadings is unsound.

No case, we submit, is cited which justifies opposing counsel's contention.

Nor is it true that the Circuit Court, having once obtained jurisdiction, can lose it because the complainants and defendants in the cross-bill are all citizens of Nevada, or that on such ground the relief prayed therein cannot be administered. The rule is well settled that where jurisdiction of a cause in a Federal court is once obtained by diverse citizenship

existing when the suit was commenced, it is not thereafter lost if such diverse citizenship should cease by subsequent change of domicil.

Morgan v. Morgan, 2 Wheat., 290, 297.

Koenisberger v. Richmond Silver Min. Co., 158 U. S., 41-49.

Louisville N. A. & C. Co. v. Louisville Trust Co., 174 U. S., 552, 566.

The same rule obtains here. As the jurisdiction by diverse citizenship *alone* properly attached when the suit was commenced, the court has full power to administer all relief—legal or equitable, as the nature of the suit may permit. Hence, if the cross-bill is *otherwise* unobjectionable, the fact that it is filed after proper commencement of the suit and is on its face between citizens of the same State could not on reason or authority defeat the right to relief therein prayed. The rule is the other way.

Stewart v. Dunham, 115 U. S., 61, 64.

Phelps v. Oakes, 117 U. S., 236, 240.

Harenbergh v. Ray, 151 U. S., 112, 118.

In *Jones v. Andrews*, 10 Wall., 327, 333, the court, speaking of the case there under review, said:

“The case in this respect, as before said, is analogous to that of a cross-bill or bill of review, or a bill of injunction against a judgment at law in the same court, of which the court has jurisdiction, irrespective of the residence of the parties.”

Careful reading of the decision of Judge Hunt in *Ames Realty Company v. Big Indian Min. Co.*, 164 Fed., 166, will disclose that the case is not susceptible of the limited interpretation sought to be put thereon by opposing counsel. The action provided in the statute of the State there cited was distinctly one at law. Manifestly an action at law, without the aid of such statute, could not have been thus

brought, tried, and determined. It was hence considered and ruled by the circuit judge that equity procedure, as administered in the Federal courts, was adapted to the purpose of the Montana statute in respect of actions at law. Manifestly the Montana statute was an unnecessary enactment if limited to proceedings in equity. *Contra*, it was merely the adoption of the rule of equity providing for the granting of full relief, and made thereby applicable to an action at law involving conflicting rights to the use of water. The extended discussion found in Judge Hunt's opinion demonstrates ~~it~~ *the* full application *of the rule* here.

We submit the decree should be affirmed.

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Of Counsel.

RICKEY LAND AND CATTLE COMPANY *v.*
MILLER AND LUX.

SAME *v.* WOOD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

Nos. 4, 5. Argued January 18, 19, 1910.—Restored to the docket for re-argument January 31, 1910.—Reargued October 24, 25, 1910.—Decided November 7, 1910.

One court ought to deal with the whole matter in litigation even where the law of different jurisdictions is involved; foreign law may be ascertained and acted upon and rights depending thereon protected.

Where riparian rights of several parcels of land in different States but on the same river are involved, the courts of both States have concurrent jurisdiction, and the court first seized should proceed to determination without interference.

Quære, whether notice to an individual in regard to his property is not notice to a corporation organized by him after such notice and to which he conveys his property.

Where, as in this case, cross-bills are maintainable, jurisdiction in respect to them follows that over the principal bill.

152 Fed. Rep. 11, 22; 81 C. C. A. 207, 218, affirmed.

THE facts are stated in the opinion.

Mr. Charles C. Boynton and Mr. James F. Peck, with whom Mr. Frederic D. McKenney was on the brief, for petitioners.

Mr. Aldis B. Browne and Mr. E. F. Treadwell, with whom Mr. W. B. Treadwell and Mr. Alexander Britton were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases are brought to this court by certiorari. The facts material to the understanding and decision of them are these. Miller and Lux is a corporation using the water of the Walker River in Nevada, and claiming rights in the same. The two branches of this river, known as East Fork and West Fork, rise in California and unite in Nevada above Miller and Lux. One Rickey used the water of both of these branches in California, and claimed rights superior to those of the parties lower down on the stream. On June 10, 1902, Miller and Lux brought a bill in equity in the Circuit Court for the District of Nevada against Rickey and certain other defendants, some of whom are respondents in the second of the present cases, to enjoin interference with its use of water. Rickey appeared, pleaded to the jurisdiction that the diversion of water by him was in California, 127 Fed. Rep. 573, and, later, answered. But, after appearing, he with other members of his family organized the petitioning corporation, and he conveyed his lands and rights in California to it. On October 15, 1904, this corporation began two actions in a state court of California against Miller and Lux, the defendants in the bill of Miller and Lux other than Rickey, and others, to quiet its title and establish its prior right to 1575 cubic feet per second on the West Fork and to 504 feet on the East Fork. In December, a few days before they were served with process in the last-

mentioned suits, other defendants in the bill brought by Miller and Lux brought a cross bill against their co-defendant Rickey to establish their priority as against him. In 1906 the bills in these present cases were brought by Miller and Lux, and defendants other than Rickey in the original Miller and Lux suit, to restrain proceedings in the California actions, on the ground that the United States court for Nevada had acquired jurisdiction before the California actions were begun. Injunctions were granted as prayed, and now are before this court for review. 152 Fed. Rep. 11. S. C., 81 C. C. A. 207. Affirming 146 Fed. Rep. 574, 581, 588.

The petitioner contends that there is no conflict of jurisdiction, and that the proceedings in the California court should go on. Its argument is this. When a right is asserted in favor of land in one jurisdiction over land in another, different principles are involved from those that suffice when both parcels are subject to the same law. When such rights have been recognized it has been on the ground of an assumed "concurrence between the two States, the one, so to speak, offering the right, the other permitting it to be accepted. *Manville Co. v. Worcester*, 138 Massachusetts, 89." *Missouri v. Illinois*, 200 U. S. 496, 521. But still there are two parcels of land subject to different systems of law; and although the rights and liabilities in respect of each may require a consideration of the other if they are to be dealt with completely, the fact remains that each may be regulated by the State where the land lies according to its sovereign will. *Kansas v. Colorado*, 206 U. S. 46, 93. If then the courts of one State are about to deal with one parcel they should not be indirectly interfered with by a foreign court that has no power to control the use of the *res*. It is said to be a general principle that apart from some privity, such as is created by contract, trust, or fraud, courts of equity recognize the impropriety of using their power over the

person to achieve such a result. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233, 242-244. *Carpenter v. Strange*, 141 U. S. 87. *Norris v. Chambres*, 29 Beav. 246, 253, 254. S. C., 3 De G., F. & J. 583, 584. It is conceivable, to be sure, that the decisions of this court may determine that the States have rights as against each other *in invitum* in streams that flow through the land of both. *Kansas v. Colorado*, 206 U. S. 46, 84. *Missouri v. Illinois*, 200 U. S. 496, 519, 520. These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older States. See *New York v. Pine*, 185 U. S. 93, 96. There may be some, perhaps limited, right of appropriation in the upper State, at least in the watershed of the stream, where irrigation is the condition of using the land. See *Kansas v. Colorado*, 206 U. S. 46, 100-104, 117. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his State, and those rights, the petitioner insists, can, or at least should be, determined only in a suit brought by the State itself.

But if for any reason the foregoing argument should not have prevailed as against Rickey if he had brought the actions in California after the beginning of the suit in Nevada, the present petitioner is not affected by the proceedings against Rickey, as they were purely personal and did not concern a purchaser of land outside the jurisdiction. To affect a purchaser with a suit against his vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court in which the suit is brought. See *Fall v. Eastin*, 215 U. S. 1.

We are of opinion that the petitioner fails to establish the conclusion for which it contends. The alleged rights

of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary to enforce it must be done in California and require the assent of that State so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada. But, leaving the latter possibility on one side, if California recognizes private rights that cross the border line, the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462. Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. To adjust the rights of the parties within the State requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.

We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States. *Prout v. Starr*, 188 U. S. 537, 544. *Ex parte Young*, 209 U. S. 123, 161, 162.

As to the argument that the Rickey Land Company is not affected by any priority that may have been gained

as against Rickey, it might be a question, even if the petitioner was a purchaser without notice, whether the purchaser would not be confined to asserting its rights in the pending cause. See *Whiteside v. Haselton*, 110 U. S. 296, 301. But in this case, if the judge below was of opinion as matter of fact on what appears that the institution of the petitioner was merely a device to dodge the jurisdiction of the Nevada court, and that the Rickey Land and Cattle Company was merely Rickey under another name, we could not say that his finding was wrong.

It is urged that the cross bills on which the bill and injunction in the second case were based were not maintainable because not in aid of the defenses to the original suit of Miller and Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller and Lux still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller and Lux from working injustice. See further, *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. Rep. 166. The cross bills being maintainable the jurisdiction in respect of them follows that over the principal bill.

Decrees affirmed.